Supreme Court, U.S.
FILED
NOV 22 2006
OFFICE OF THE CLERK

No. 06-719

IN THE

Supreme Court of the United States

KENNETH BENDER, ET AL., PETITIONERS

v.

DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

DALE A. COOTER
Counsel of Record
DONNA S. MANGOLD
COOTER, MANGOLD,
TOMPERT & KARAS, L.L.P.
5301 Wisconsin Avenue, N.W.
Suite 500
Washington, D.C. 20015
(202) 537-0700

CURRY & TAYLOR • WASH D.C. • (202) 393 4141 • USSCINFO.COM

QUESTIONS PRESENTED

Petitioners, who are nonresidents of the District of Columbia, paid unincorporated business taxes in the amount of $241,815 in the form of a tax on their net personal incomes as a result of their membership in four real estate partnerships in the District of Columbia. Petitioners challenged this application of the unincorporated business tax as a violation of the District of Columbia Self-Government and Governmental Reorganization Act (the "Home Rule Act"), (Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code § 1-201.01 et seq.). This case presents the following issues:

I. Did the District of Columbia Court of Appeals err in *Bender v. District of Columbia*, 906 A.2d 277 (D.C. 2006), in holding that the prohibition in the Congressionally-enacted Home Rule Act barring "any tax" on nonresidents does not apply to the D.C. Council's application of the unincorporated business tax to nonresidents, a holding that is in direct conflict with the result reached by the Virginia Supreme Court in *Mathy v. Commonwealth of Virginia, Dept of Taxation*, 253 Va. 356, 483 S.E. 2d 802 (1997), *cert. denied*, 522 U.S. 967 (1997)?

II. Does the Home Rule Act, which bars the District of Columbia from imposing "any tax" on the personal income of a nonresident, also preclude the imposition and collection of unincorporated business taxes in their current form – as a tax on net personal income -- from nonresidents who are not professionals or engaged in personal service

businesses but who receive income from unincorporated businesses in the District of Columbia?

PARTIES TO THIS PROCEEDING

Petitioners in this case are Kenneth Bender, Lisa Bender-Feldman, Scott Bender, and Jay Bender, all individual, nonresidents of the District of Columbia, and members of the following unincorporated businesses: Jack I. Bender and Sons (Bender & Sons); Northwestern Development Company "B" (Northwestern Co.); Rhode Island and M Associates (Rhode Island Assoc.); and Twelfth and L Streets Limited Partnership (Twelfth LP). Petitioners were plaintiffs and appellees below.

Respondent is the District of Columbia. The District of Columbia was the defendant and appellant below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 3

REASONS FOR GRANTING THE PETITION 22

CONCLUSION 30

APPENDIX

D.C. Court of Appeals Decision 1a
D.C. Superior Court Decision 15a
Relevant Provisions Involved 31a

TABLE OF AUTHORITIES

Page

CASES

BANNER v. UNITED STATES OF AMERICA, 303 F.SUPP.2D 1 (D.D.C. 2004) 11, 27

BENDER v. DISTRICT OF COLUMBIA, 2006 WL 932328 (D.C. SUPER., MARCH 8, 2006) 1

BENDER v. DISTRICT OF COLUMBIA, 906 A.2D 277 (D.C. 2006) 1, 5, 21, 22

BISHOP v. DISTRICT OF COLUMBIA, 401 A.2D 955 (D.C. 1979), AFF'D EN BANC, 411 A.2D 997 (D.C. 1980), CERT. DENIED, 446 U.S. 966 (1980) ..... *passim*

BRAXTON v. UNITED STATES, 500 U.S. 344 (1991) 26, 27

DISTRICT OF COLUMBIA v. CALIFANO, 647 A.2D 761 (D.C. 1994) 5, 17, 18

GARDELLA v. COMPTROLLER OF MARYLAND, 213 MD. 109, 130 A.2D 752 (1958) 9, 16

GUY v. WISCONSIN, 509 U.S. 914 (1993) 25

HUBBARD v. UNITED STATES, 514 U.S. 695 (1995) 26

KING v. FORST, 239 VA. 557, 391 S.E.2D 60 (1990) .. 4, 17, 23, 24

MACFARLANE v. UTAH STATE TAX COMM'N, 548 UTAH ADV. REP. 15, 134 P.3D 1116 (UTAH 2006) 4, 17

MATHY v. COMMONWEALTH OF VIRGINIA, DEPT OF TAXATION, 253 VA. 356, 483 S.E. 2D 802 (1997), CERT. DENIED, 522 U.S. 967 (1997) ..... *passim*

METROPOLITAN LIFE INS. CO. v. WARD, 470 U.S. 869, 105 S.CT. 1676 (1985) 29

MONGE v. CALIFORNIA, 524 U.S. 721 (1998) 25

NICHOLS v. UNITED STATES, 511 U.S. 738 (1994) 26

PUD NO. 1 OF JEFFERSON COUNTY AND CITY OF TACOMA v. WASHINGTON DEPT. OF ECOLOGY, 511 U.S. 700 (1994) 25

ROACH v. COMPTROLLER OF THE TREASURY, 327 MD. 438, 610 A.2D 754 (1992) 4, 16, 17

UNITED STATES v. DALM, 494 U.S. 596 (1990) 26

UNITED STATES v. YERMIAN, 468 U.S. 63 (1984) 26

STATUTES

28 U.S.C. § 1254(1) 1

61 STAT. 328 (1947) 1

61 STAT. 334 (1947) 8

61 STAT. 343 (1947) 6

61 STAT. 345 (1947) 7

61 STAT. 346 (1947) 7, 8

61 STAT. 349 (1947) 8

81 STAT. 948 (1967) 10

85 STAT. 576 (1971) 12

87 STAT. 774 (1973) 10

88 STAT. 1036 12

D.C. CODE § 11-721 (A)(1) (2001) 1

D.C. CODE § 1-201.02 (2001) 10

D.C. CODE § 1-203.02 (2001) 11

D.C. CODE § 1-204.04 (2001) 11

D.C. CODE § 1-206.01 (2001) 11

D.C. CODE § 1-206.02 (2001) 23

D.C. CODE § 1-206.02 (A) (5) (2001) 2, 3, 11, 19

D.C. CODE § 1-207.61 (2001) 12

D.C. CODE § 47-1574 (1973) 13

D.C. CODE § 47-1808.03 (2001) 2

D.C. CODE §§ 1-204.21-24 (2001) 11

PUB. L. NO. 80-195 1

PUB. L. NO. 90-623 10

PUB.L NO.92-180 12

PUB. L. NO. 93-407 ..... 12, 21

VA. CODE § 58.1-332 ..... 23, 24

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. XIV 2

U.S. CONST. ART. I 2

RULES

SUPREME COURT RULE 10(C) 23, 30

SUPREME COURT RULE 10(b) 23

OPINIONS BELOW

The Opinion and Order of the Superior Court of the District of Columbia, Tax Division (Lopez, J.)(CVT 8524-05) in *Bender v. District of Columbia*, 2006 WL 932328 (D.C. Super., March 8, 2006)("Lopez Op."), granting Plaintiffs' Cross-Motion for Summary Judgment, is unreported and is reprinted in the Appendix hereto at 15a (hereinafter, "Pet. Appx."). The District of Columbia Court of Appeals decision reversing the opinion of the Tax Division is reported as *Bender v. District of Columbia*, 906 A.2d 277 (D.C. 2006), and is reprinted in Pet. Appx. at 1a.

JURISDICTION

The Superior Court of the District of Columbia had original jurisdiction over this matter pursuant to D.C. Code § 47-3310(b)(2001). Its decision was entered on March 8, 2006 and its subsequent order granting Petitioners a tax refund was entered on March 24, 2006. The District of Columbia Court of Appeals had jurisdiction over this case pursuant to D.C. Code § 11-721 (a)(1) (2001), and it issued its decision in this matter on August 24, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The District of Columbia Revenue Act of 1947, Pub. L. No. 80-195, 61 Stat. 328 (1947) (the "Revenue Act of 1947"). Article I of the Revenue Act of 1947 specifically provided for a tax on individuals, both residents and nonresidents (Title VI), on corporations (Title VII), and on unincorporated businesses (Title VIII). Pet. Appx. at 52a.

The District of Columbia Home Rule Act provides, in pertinent part, that "[t]he Council [of the District of Columbia] shall have no authority to "[i]mpose any tax on the whole or any part of their personal income, either directly or at the source thereof, of any individual not a resident of the District [of Columbia]... ." D.C. Code § 1-206.02(a)(5) (2001) (Pet. Appx. at 38a).[1]

The District of Columbia imposes a tax on resident and nonresident members of unincorporated businesses (the "UB Tax" or "UBT"). The UB Tax is codified at D.C. Code § 47-1808.03 (2001). (Pet. Appx. at 40a).

The "District Clause" of the United States Constitution provides, in pertinent part, that Congress shall have the power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States... .

U.S. Const. Art. I, § 8, cl 17.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

---

[1] All references in this Petition shall be to D.C. Code § 1-206.02 (a)(5) or to the "Prohibition" under the Home Rule Act.

STATEMENT

I. INTRODUCTION

The case of *Bender v. District of Columbia* arises, as one commentator described it, "at the intersection of the [unincorporated business] Tax and the provision in the District's Home Rule Act commonly known as the 'commuter tax ban.'"[2] This case presents the question of whether nonresidents who are members of an unincorporated business earning income in the District - but who are not "professionals" or members of a personal service business - are properly subject to the UB Tax imposed by the District of Columbia in the form of a tax on net personal income. Critical to this case is the language of the so-called "commuter tax ban," the prohibition fashioned by Congress in the Home Rule Act against taxing nonresidents. "The Prohibition," as some courts have termed it, by its plain language, is not limited to a ban on taxing commuters. As is clear from the statute, Congress decreed in the Home Rule Act that the D.C. Council shall have no authority to "impose *any tax* on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District [of Columbia]... ." D.C. Code § 1-206.02 (a) (5) (2001)(emphasis added), (Pet. Appx. at 36a). The language of the Prohibition simply does not limit it to a ban on a commuter tax.[3]

The District of Columbia Court of Appeals previously determined in *Bishop v. District of Columbia*, 401 A.2d 955 (D.C. 1979), *aff'd en banc*, 411 A.2d 997 (D.C. 1980), *cert. denied*, 446 U.S. 966 (1980),

---

[2] *See* James M. Grosser, Pillsbury Winthrop Shaw Pittman LLP, State and Local Tax Bulletin (March 2006).

[3] The terms "individual and "resident" are to be understood for the purposes of this paragraph as they are defined in § 47-1801.04 (2001)(Pet. Appx. 38a).

that although the filing and payment obligations for the UB Tax fall on the unincorporated business, the economic burden of the UB Tax itself falls on the individual taxpayer and is, in essence, an income tax. *See* 401 A.2d at 961, n. 18. After examining the nature and effects of the UB Tax, the *Bishop* court concluded unequivocally that it is "a tax levied on net income," and held that, "to the extent that we deal with individuals who are professionals and are not protected by the corporate veil, we must find that the tax burdens the taxpayer personally." *Id.* at 961.[4]

Other state courts relying on *Bishop* have uniformly interpreted it as holding that the UB Tax is, in its "nature and effect," an income tax. *See, e.g., King v. Forst*, 239 Va. 557, 391 S.E.2d 60 (1990), *Roach v. Comptroller of the Treasury*, 327 Md. 438, 610 A.2d 754 (1992), *Mathy v. Commonwealth of Virginia, Dept of Taxation*, 253 Va. 356, 483 S.E. 2d 802 (1997), *cert. denied*, 522 U.S. 967 (1997); *see also MacFarlane v. Utah State Tax Comm'n*, 134 P.3d 1116, 1120 n. 8 (Utah 2006). The Petitioners in the present case successfully argued in the Tax Division that the holding in *Bishop* applied not only to professional or personal service businesses, but also to other individuals engaged in business and "not protected by the corporate veil." 401 A.2d at 961. As the Tax Division correctly observed, Petitioners acknowledge that, consistent with the language of *Bishop*, their businesses are subject to the District's UB Tax, but not in the form of a tax on their net personal incomes. Pet. Appx. 28a (Lopez Op.); *Bishop*, 401 A.2d at 961. The Tax Division thus concluded that the Prohibition established by Congress in the Home Rule Act effectively limited the Council's exercise of its

---

[4]. The *Bishop* court viewed the Prohibition to mean that "Congress specifically provided in the [Home Rule Act] that the District of Columbia could enact *no tax* which levied upon personal income of nonresidents." *Id.* at 958 (emphasis added).

regulatory authority to impose the UB Tax upon "any UB net income to the extent that the [unincorporated business] distributes directly to the nonresident individuals, whether professionals or otherwise." Pet. Appx. 28a (Lopez Op.). The District of Columbia appealed the ruling and the District of Columbia Court of Appeals reversed.

Petitioners now seek a Writ of Certiorari because this case presents important questions that only this Court can resolve: what did Congress mean when it enacted the language of the Home Rule act prohibiting the DC. Council from imposing "any tax" on the personal income of nonresidents? Did it mean to preclude only a "commuter tax"? And, what is the effect of the D.C. Court of Appeals ruling in the present case that the Prohibition does not apply to the D.C. Council because Congress, not the Council, enacted the original Revenue Act of 1947? And, how do lower courts resolve the conflict between the Court of Appeals decision in *Bender* (which holds that the Home Rule Act does not act as a bar to the imposition of the UB Tax in its current form), and that Court's prior rulings in *Bishop* and *District of Columbia v. Califano*, 647 A.2d 761 (D.C. 1994), as well as the ruling of the Virginia Supreme Court in *Mathy v. Commonwealth of Virginia*, 483 S.E. 2d 802, which held that the UB Tax imposed on nonresident real estate investors was "illegal and unauthorized under the Home Rule Act ... ." *Compare* Pet. Appx. 12a (*Bender*, 906 A.2d at 283 n. 2), and *Mathy*, 483 S.E.2d at 805. Petitioners respectfully request this Court to grant certiorari to consider these issues.

II. THE STATUTORY SCHEME

A. The District of Columbia Revenue Act of 1947

The United States Congress, Article I, § 8, granted the power to Congress to legislate for the District of Columbia. Pursuant to that pow r, Congress enacted the Revenue Act of 1947. Article I of the Revenue Act of 1947 is entitled the "Income and Franchise Tax Act" and specifically provided for a tax on individuals, both residents and nonresidents (Title VI), on corporations (Title VII), and on unincorporated businesses (Title VIII). Titles VI and VIII provide as follows:

> Title VI—Tax on Residents and Nonresidents
>
> Sec. 1 Definition—For the purposes of this article and unless otherwise required by the context, the words taxable income mean the entire net income of every resident, in excess of the personal exemptions and credits for dependents allowed by section 2 of this title and that portion of the entire net income or every nonresident which is subject to tax under title VIII of this article.

61 Stat. 343 (Pet. Appx. 69a).

> Title VIII—-Tax on Unincorporated Businesses Sec. 1—Definition of Unincorporated Business—For the purpose of this Article (not alone of this title) and unless otherwise required by the context, the words "unincorporated business" mean any trade or business, considered or engaged in by any individual, whether resident or nonresident * * * * other than a trade or

> business conducted or engaged in by a corporation; and include any trade or business which if conducted by a corporation would be taxable under title VII of this article. *The words "unincorporated business" do not include any trade or business which by law, customs, or ethics cannot be incorporated or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business in which capital is not a material income-producing factor.*

61 Stat. 345-46 (emphasis added)(Pet. Appx. 73a).

> Sec. 2. Taxable Income Defined—For the purposes of this title, and unless otherwise required by the context, the words "taxable income" mean the amount of net income derived from sources with the District within the meaning of title X of these articles in excess of the exemption granted by section 4 of this title.

61 Stat. 346 (Pet. Appx. 74a).

> Sec. 3. Imposition and Rate of Tax—For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 per centum upon the taxable income of every unincorporated

> business, whether domestic or foreign (except as expressly exempt under title II of this article).[5]

61 Stat. 346, (Pet. Appx. at 74a). Thus, by enacting the Revenue Act of 1947, Congress both "enacted" the tax on unincorporated businesses and "imposed" the tax and its initial rate. Moreover, in Title X Congress stated the *purpose* of its enactment:

> Title X —Purpose of this Article and Allocation and Apportionment Sec. 1. Purpose of Article— It is the purpose of this article to impose (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) *a franchise tax* upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District ... .

61 Stat. 349 (emphasis added) (Pet. Appx. at 76a). The regulations under the Revenue Act of 1947 provided that "[t]he purpose of the unincorporated business tax was to impose a tax upon all business income which would be subject to the corporation franchise tax, if incorporated, regardless of whether the business is carried on by an individual, by a partnership, or by some other unincorporated entity." (Section 8-1(b) of the Regulations of the Government of the District of Columbia, promulgated August 28, 1947 [Title 16, DCRR Part 307, p. 122]). By this language, Congress expressed its clear intention that any tax on unincorporated

---

[5] Title II of the Income and Franchise Tax Act lists an extensive group of organizations and associations that are exempt from the provisions of Article I; nonresident individuals are not listed among them. 61 Stat. 334 (Pet. Appx. at 64a).

businesses in the District of Columbia must be in the form of a *franchise tax* – not a tax on individual income.

One of the earliest cases to examine the District's UB Tax was *Gardella v. Comptroller of Maryland*, 213 Md. 109, 130 A.2d 752 (1958). In that case, the plaintiffs were a husband and wife who had filed a joint income tax return in Maryland, and sought a credit from the State of Maryland against their Maryland taxes to the extent that Maryland would tax the same income as was subject to the UB Tax. The Comptroller disallowed the credit, the State Tax Commission affirmed, and the lawsuit ensued . 130 A.2d at 752-53. On appeal, the sole question was whether the UB Tax was an "income tax" on part of the net income, and thereby worthy of a credit, or a "franchise" tax, for which no credit would be given. The Maryland Court of Appeals examined the relevant provisions of the Revenue Act of 1947[6] and rejected the appellants' contention that the UB Tax was an income tax. 130 A.2d at 753. It did so, however, because the "law making power" in the District of Columbia was the Congress of the United States, and Congress had labeled the UB Tax a "franchise tax." *Id.* The *Gardella* Court explained that while "[i]t is true the mere legislative declaration that a tax shall be of a particular character, does not make it such, nevertheless, the declaration of the law making power is entitled to much and respectful weight." *Id.* (citations omitted). Later, after the District of Columbia Court of Appeals ruling in *Bishop*, the Maryland Court of Appeals used the same rationale to determine that the UB Tax is, in fact, an income tax.

---

[6] At the time, the District of Columbia Unincorporated Business Franchise Tax was codified in the District of Columbia Code at D.C. Code § 47-1574 (1951).

B. The Home Rule Act of 1973

By 1967, the push for Home Rule in the District of Columbia was well under way,[7] and Congress enacted Reorganization Plan Number 3, which vested in the D.C. Council[8] the authority to, *inter alia*, prescribe regulations for determining the formulas for the portion of net income subject to tax under the 1947 Income and Franchise Tax Act. *See* Reorganization Plan of 1967, Pub. L. No. 90-623, 81 Stat. 948 (1967). Reorganization Plan 3 gave the Council no power to enact or impose taxes in the District – it simply gave the Council the authority to regulate the formulas for taxation.[9] In 1973, however, Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act (the "Home Rule Act"), (Publ. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code §§ 1-201.01 (2001), et seq., Pet. Appx. at 31a). The Home Rule Act provided for an elected mayor and Council, and delegated to the Council "certain legislative powers" that were "[s]ubject to the retention of Congress of the ultimate legislative authority of the nation's capital." D.C. Code § 1-201.02 (2001) (Pet. Appx. at 31a). The Home Rule Act protects Congress's exclusive jurisdiction over the District by providing that Council

---

[7] Between 1948 and 1966, the Senate passed six different bills granting the District some form of home rule, but each time the bill died in the House Committee for the District of Columbia. In 1967, a mayor and council, appointed by the President, replaced the then existing commissioner system. *Banner v. United States of America*, 303 F.Supp.2d 1,4 (D.D.C. 2004) (*citing Adams v. Clinton*, 90 F.Supp2d 35, 47 n.19 (D.D.C. 2000)).

[8] At that time the DC Council was appointed by the President; it was not an elected body.

[9] The Tax Division described this legislation by Congress as "grafting" the regulating function of the UB Tax from the 1947 Tax Act and transferring it to the Council's control. Pet. Appx. 19a (Lopez Op.)

enactments become law only if Congress declines to pass a joint resolution of disapproval within thirty days (or sixty days in the case of criminal laws), and by reserving the power to repeal Council enactments at any time. *See Banner v. United States of America*, 303 F.Supp.2d 1, 4-5 (D.D.C. 2004) *citing* D.C. Code § 1-206.01,1-206.02 (c)(1)-(c)(2) (2001) (Pet. Appx. at 36a). The role of the Mayor is to execute and enforce the laws. *See* D.C. Code §§ 1-204.21-24 (2001). The Home Rule Act also specifically limits the Council's law making powers, enumerating matters that are not the "rightful subjects" of legislation by the Council. D.C. Code § 1-203.02 (2001) (Pet. Appx. at 32a). For example, the District may not impose any tax on federal property or the property of the states; enact any act or regulation with respect to the Commission on Mental Health or the District of Columbia courts; and it may not enact any act or rule that permits the building of any structure in excess of certain height limits. *See* D.C. Code § 1-206.02 (a)(1)-(a)(8) (2001) (Pet. Appx. at 36a); *Banner*, 303 F.Supp.2d at 5.

Moreover, the Home Rule Act stipulated that "all functions granted to or . . . transferred to the District of Columbia Council, as established by Reorganization Plan number 3 of 1967, shall be carried out by the Council in accordance with the provisions of [the Home Rule Act]." D.C. Code § 1-204.04 (2001), (Pet. Appx. at 33a). Thus, the authority to regulate the formulas for taxing net income under the Income and Franchise Tax Act of 1947, including the UB Tax, vested in the Council by Congress in 1967, also became subject to the limitations of the Home Rule Act, including the Prohibition on the power to "impose" taxes on nonresidents. *See* Pet. Appx. 19a, 21a (Lopez Op.). Finally, the Home Rule Act states that if it is inconsistent with any other laws, the Home Rule Act prevails, and that no law in force on January 1, 1975 (the

effective date of the Home Rule Act) is deemed amended or appealed except to extent "specifically provided herein" or to the extent "inconsistent with this chapter." D.C. Code § 1-207.61 (2001)(Pet. Appx. 37a).[10]

C. The Revenue Act of 1975

In June 1975, the D.C. Council, pursuant to the legislative authority granted to it by the Home Rule Act, adopted the Revenue Act of 1975 (subsequently enacted as D.C. Law No. 1-23). The Act was signed by the Mayor and sent to both Houses of Congress for the required thirty-day review. It was not disapproved and consequently became law on October 21, 1975. The Revenue Act of 1975 was substantially similar to the Revenue Act of 1947 and contained a provision for the taxation of unincorporated businesses.[11] Section 605 of the Revenue Act of 1975, however, made a change to the UBT: it deleted the second sentence of the "definition"

---

[10] In September 1974, nine months after the Home Rule Act was enacted but before its effective date of January 1, 1975, Congress enacted legislation authorizing the Council *to change the rates* of taxation under the 1947 Revenue Act (including the Tax and Franchise Act) for the express purpose of raising funds to increase salaries of public servants such as teachers, police officers and firefighters. *See* Pub. L. No. 93-407, 88 Stat. 1036, § 471 (Pet. Appx. at 45a). Nothing in that Act negates Congress' intent in the Home Rule Act to preclude the Council from imposing taxes on the personal income of nonresidents. Moreover, to the extent that legislation is inconsistent with the Home Rule Act, (and Petitioners do not believe that it is), it would have been deemed amended or repealed as of January 1, 1975.

[11] In 1971, Congress had enacted the Professional Corporation Act (Pub.L. No.92-180, 85 Stat. 576 (1971)), and the Income and Franchise Act was amended to maintain an exemption for unincorporated professional associations after what appeared to be persuasive lobbying by representatives of the Bar associations of Virginia and Maryland. See *Bishop*, 401 A.2d at 957 (citing legislative history).

section of the UB Tax, thereby repealing the statutory exemption for professional associations and personal service businesses. The deleted sentence read:

> *The words "unincorporated business" do not include any trade or business which by law, customs, or ethics cannot be incorporated, any trade, business or profession which can be incorporated only under chapter 11 of title 29, or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business in which capital is not a material income-producing factor.*

D.C. Code § 47-1574 (1973). The repeal of this so-called professional exemption allowed the District of Columbia for the first time to impose the UB Tax on unincorporated professionals and personal service businesses, creating a tax burden on thousands of nonresidents. Thus, through the 1975 Revenue Act, the Council had legislated and imposed its own version of the UB Tax.

III. THE UB TAX IS AN INCOME TAX

In 1978, two nonresident lawyers, one a Virginia resident (Bishop) and the other a resident of Maryland, both of whom practiced law in the District of Columbia, challenged the validity of § 605 of the Revenue Act, which had repealed the existing professional exemption, thus permitting the District to impose the UB Tax on unincorporated professionals and personal service businesses. *Bishop v. District of Columbia*, 401 A.2d 955 (D.C. App.1979), *aff'd en banc*, 411 A.2d 997 (D.C.

App. 1980), *cert. denied*, 446 U.S. 966 (1980). Each plaintiff had paid his UB Taxes for the calendar year 1975 and filed a petition for refund. Following the denial of their claims at the administrative level, each filed a petition for refund in the Tax Division of the Superior Court, where their petitions were consolidated for trial. 401 A.2d at 956. The Tax Division denied plaintiffs' request for refund of the UB Taxes and dismissed their petitions with prejudice, and the appeal ensued. *Id.*[12]

On appeal, appellants argued that the UB Tax was an *ultra vires* measure, enacted by the Council in violation of its delegated powers, and was inherently a tax on personal income and thus directly barred by the Home Rule Act. *Id.* at 956-57. In response, the District argued that the UB Tax was a franchise tax, "a tax on the right to earn income in District, measured by the amount of income earned, and nothing more." *Id.* at 960, 961 n. 17. In considering this issue, the D.C. Court of Appeals engaged in an in-depth analysis of the *nature* of the UB Tax, emphasizing that a tax must be characterized based on its nature and effect, rather than on any label or title affixed to its provisions. *Id.* at 958. The court observed that, "by its very terms," the UB Tax is an income tax because it is leveled on taxable income, which is defined as " 'the amount of net income derived from sources within the District . . . in excess of the exemptions granted by [DC Code] § 47-1574c'... ." *Id.* at 960 (*citing* D.C. Code § 47-1574(a)). The court distinguished between a tax on gross receipts and a tax

---

[12] After the hearing, the Tax Division ordered, *sua sponte*, a rehearing on the provisions of the Revenue Act of 1975 as they related to setting the effective dates of the imposition of the UB Tax on professionals. The Tax Division held that the imposition of the tax on members of the same class according to their respective tax years, calendar or fiscal, discriminated against the calendar year taxpayers. The Tax Division ordered refunds to the class of affected taxpayers, but did not change its ruling denying plaintiffs' requests for refunds. 401 A.2d at 956.

on net income, concluding that the UB Tax is an income tax: a "tax on gross receipts is not an income tax; a tax on net income is so, regardless of its nomenclature." *Id.* at 960. The *Bishop* Court explained:

> The [UB] tax is levied on personal income. If we dealt here with a corporate franchise tax, the result would be different. To the extent we deal with individuals who are professionals and are not protected by the corporate veil, we must find that the tax burdens the taxpayer personally. *We do not mean to imply that the District of Columbia cannot tax nonresident professionals who operate an unincorporated business. We say only that the District of Columbia cannot tax the personal income of nonresidents.*

Id. at 961 (emphasis added). On rehearing *en banc*, the Court of Appeals examined the legislative history of Home Rule and, in particular, the House debate regarding the Prohibition:

> The remarks of Representative Breckenridge of Kentucky are particularly revealing on the question of congressional intent: "I am concerned about the phrase 'personal income tax.' I take it what we are driving at here is precluding *any tax which is based on a percentage of income regardless of whether it is technically considered personal income...* ." [One of the sponsors of the Home Rule Prohibition] answered: "The thrust of this amendment, the interpretation would be that that would be included under this amendment. That was the intent when the amendment was offered in the Senate."

411 A. 2d at 998 (citations omitted) (emphasis added). The *en banc* panel affirmed, stating:

> [w]e agree, and reiterate our conclusion that Congress expressly and specifically withheld the District of Columbia Council's authority to impose a tax on the income of nonresidents. By enacting s. 605 of the revenue Act of 1975, which repealed the professional exemption contained in s 47-1574, the Council circumvented this express Congressional prohibition. Section 605 is therefore invalid.

411 A. 2d at 999.[13] Thus, the Court's holding in *Bishop* accomplished two things. First, it invalidated § 605 of the Revenue Act of 1975 thereby reinstating the exemption for professional associations. But significantly, it also declared that the UB Tax was a tax levied on personal income in direct violation of the Congressional Prohibition. Following *Bishop*, the Maryland Court of Appeals revisited the UB Tax issue in *Roach v. Comptroller of the Treasury*, 327 Md. 438, 610 A.2d 754 (1992). In *Gardella*, the Maryland court had held that the UB Tax was a franchise tax. 130 A.2d at 753. The *Roach* Court, however, observed that the statute involved in *Gardella* had been replaced by provisions of the Revenue Act of 1975, and that the specific section of the 1975 statute imposing the UB Tax had been before the D.C. Court of Appeals in *Bishop*, 610 A.2d at 756 (citation omitted). Adopting the interpretation of the statute by the *Bishop* Court, the

---

[13] In response to the District's challenge that the language of the Prohibition was not clear, the *Bishop* Court stated, "we must presume that 'Congress legislated with care'" when it enacted the Prohibition, and found that Congress "expressly and specifically" withheld the Council's authority to impose, not just a commuter tax, but a tax on personal income of nonresidents. 411 A.2d at 999.

Maryland Court of Appeals found that the UB Tax was an income tax and not a franchise tax, and that the Maryland taxpayers in the case were entitled to a credit for the amounts paid to the District of Columbia as UB Taxes. *Roach*, 610 A.2d at 757, 759. [14] If there were any doubt about the depth of the ruling in *Bishop*, it was removed when the D.C. Court of Appeals issued its opinion in *District of Columbia v. Califano*, 647 A.2d 761 (D.C. 1994). In *Califano*, taxpayers sought a credit against their District of Columbia income taxes for amounts paid under New York City's unincorporated business tax. *Id.* at 761. The taxpayers were District of Columbia residents working in the Washington office of a law firm headquartered in New York. *Id.* As a New York partnership, the law firm was subject to New York's unincorporated business tax. The only issue before the court in *Califano* was whether the appellees were entitled to a tax credit for the payment of the New York tax. In arguing that they were not, the District advanced the argument that, despite the holding in *Bishop*, the New York unincorporated business tax was not an "individual income tax." The *Califano* court soundly rejected the District's argument, relying on its analysis in *Bishop*. *Id.* at 763. Although the *Califano* Court acknowledged that *Bishop* did not say that the

---

[14] Other states have also interpreted the UB Tax to be a tax on individual income. *See, e.g.*,Mass. Dept. of Revenue, Letter Ruling 94-8: Credit for District of Columbia Unincorporated Franchise Tax, 10/4/94 (the UB Tax "is by nature and has the incidents of an income tax" even though the D.C Council and the Comptroller refer to the UBT as a "franchise tax," because the UBT is based on net income and not gross receipts)(citing *King v. Forst*, 239 Va. 557, 391 S.E.2d 60 (1990); and *Roach v. Comptroller*, 610 A.2d. 754 (1992)). Other states concur in the characterization of a state's unincorporated business tax as an income tax. *See, e.g., MacFarlane v. Utah State Tax Comm'n*, 548 Utah Adv. Rep. 15, 134 P.3d 1116 (Utah 2006) (credit to Utah taxpayers for taxes paid in other states).

UB Tax was an "individual income tax," it did hold that the UB Tax "burdens the taxpayer personally." *Id.* at 764. The *Califano* Court examined the sections of the D.C. Code that "bridge the gap" between the terms "individual income tax" and an "income tax falling on the 'personal income' of an individual." *Id.* at 764-65. The *Califano* Court concluded that "the term 'individual income tax' cannot rationally denote anything other than an income tax paid by an individual," and ruled that "guided by *Bishop*" the appellees in *Califano* met the guidelines for a tax credit under the D.C. Code. *Id.* at 765. [15]

IV. THE PROCEEDINGS BELOW

The facts in this case are undisputed. Petitioners Kenneth Bender, Lisa Bender-Feldman, Scott Bender, and Jay Bender are all nonresidents of the District of Columbia, and members of four real estate partnerships in the District of Columbia, from which they earn income. None of the Petitioners were resident in the District of Columbia for any portion of the years at issue in this case.[16] Nonetheless, for the years 1999 through 2002 they collectively paid a total of $241,815 to the District of Columbia as taxes levied on their personal incomes in the form of an unincorporated businesses tax.[17] Petitioners filed refund claims for these years

---

[15] Title 47, D.C. Code Enactment Act of 1996, occurred after the decisions in *Bishop* and *Califano* and thus had no impact on those rulings.

[16] Kenneth Bender is a resident of Montana. Lisa Bender-Feldman is a resident of Florida. Scott Bender and Jay Bender are Maryland residents.

[17] Kenneth Bender paid $60,446.00, Scott Bender paid $60,464.00, Jay Bender paid $60,459.00 and Lisa Bender-Feldman paid $60,446.00 in UB Taxes for the years at issues. Pet. Appx. 16a (Lopez Op.)

with the District of Columbia Tax Office, and their claims were denied. The D.C. Office of Tax Appeals denied their subsequent appeals.

On May 17, 2005, Petitioners filed a petition for a refund of their UB Taxes in the Tax Division of the Superior Court of the District of Columbia. Pet. Appx. 16a (Lopez Op.). Because the issues in dispute were purely legal in nature, the case was amenable to summary disposition, and the parties filed cross-motions for summary judgment. The Benders argued, relying upon *Bishop*, that they were entitled to a full refund of their UB taxes on the ground that the District's imposition of the UBT on the personal income of nonresidents violated the Prohibition contained in the Home Rule Act. D.C. Code § 1-206.02(a)(5) (2001)(Pet. Appx. 36a). In response, the District argued that the UBT is a permissible federally-created "franchise" tax "for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District." Pet. Appx. 16a (Lopez Op.) (*citing* D.C. Code § 47-1810.01(a)(2) (2001) (Pet. Appx. 41a). This argument was offered by the District more than twenty-five years ago, and expressly rejected by the Court of Appeals in *Bishop*. 401 A.2d at 959-60.

The District also argued that, the Home Rule Prohibition notwithstanding, because Congress enacted the Revenue Act of 1947, Congress exclusively controls the District of Columbia UBT while the Council merely "administers" it. *See* Pet. Appx. 20a (Lopez Op.) (*citing* D.C. Reply Br. at 7-8). Accordingly, the Respondent theorized, because Congress, not the Council, enacted the original UBT (in 1947), the Home Rule Act's Prohibition against imposing "any tax" on the personal income of nonresidents does not apply to income earned from unincorporated businesses. *See* Pet. Appx. 21a (Lopez Op.) (*citing* D.C. Reply at 11). The District

also argued that *Bishop* was inapplicable because Congress intended to exempt from UB taxation only those professional and personal service businesses where capital was not a material income-producing factor. *See* Pet. Appx. 24a (Lopez Op.). The Tax Division carefully analyzed, and properly rejected, both of the District's theories.

On March 9, 2006, the Tax Division issued a decision denying the District's motion for summary judgment, granting the Benders' cross-motion for summary judgment, and ordering a tax refund. The Tax Division determined that, consistent with *Bishop* and *Califano*, the UBT impermissibly imposed a tax in the form of a tax on the personal income of Petitioners who are nonresidents of the District of Columbia. Pet. Appx. 25a (Lopez Op.). The Tax Division acknowledged that it was extending the holding in *Bishop* to encompass income from business activities other than the exempted professional or personal services. The Tax Division held that "the Prohibition does effectively limit the Council's exercise of its UB regulatory authority to impose upon any [unincorporated business] net income to the extent that the [unincorporated business] distributes directly to nonresident individuals, whether professionals or otherwise." Pet. Appx. 27a-28a (Lopez Op.). The court observed that "there is a distinction between a business excluded from UB taxation and a business subject to UB taxation but in a limited scope. Here, Petitioners are not denying that their businesses are unincorporated entities subject to taxation." Pet. Appx. 24a-25a (Lopez Op.). Petitioners contend only that the UB Tax cannot be imposed *in the form of a tax on personal income* because the Home Rule Act forbids such a tax. The Tax Division concluded that the UB Tax on nonresidents violated the Home Rule Prohibition. Pet. Appx. 30a (Lopez Op.).

The District appealed, and in an opinion dated August 24, 2006, the Court of Appeals reversed the Tax Division. The appellate court characterized the trial court's opinion as "holding that [the Enactment Act of 1996] violated the provisions of the Home Rule Act by permitting the Council of the District of Columbia to impose the UB Tax on the personal income of a real estate partnership's nonresident partners." Pet. Appx. 2a (*Bender*, 906 A.2d at 278).[18] In reversing the Tax Division, the Court of Appeals relied on two theses: first, it found that the *Bishop* holding was limited to "nonresident, unincorporated professionals and personal services businesses," Pet Appx. 7a (*Bender*, 906 A.2d at 281); second, it adopted the District's argument that the original Revenue Act of 1947 was not affected by the enactment of the Home Rule Act, and that therefore Congress retains control over the UBT. Pet. Appx. 9a (*Bender*, 906 A. 2d at 282). The Court of Appeals reasoned that "Congress' enactment of the Act of September 3, 1974 after the passage of the Home Rule Act and the specific language of that legislation stating that the Council 'is authorized to changed the rate of the taxes *imposed* under [the Tax Act of 1947]'" demonstrated that "the UB Tax remained in effect" after Home Rule. Pet. Appx. 13a (*Bender*, 906 A.2d at 282, n. 4)(emphasis in original)[19]. Thus, despite the

---

[18] This statement is curious, because the Tax Division did not find that the 1996 Act *violated* Home Rule. Rather, the Tax Division concluded (Pet. Appx. 29a-30a (Lopez Op.)) that the 1996 re-enactment carried forward the Home Rule Act's Prohibition "on the Council to impose a tax upon any UB net income to the extent of [sic] that net income is to be distributed to the nonresidents directly and personally."

[19] Petitioners submit that the *Bender* Court placed too much significance on the effect of the 1974 Salary Act, PL 93-407, which is an amendment to the D.C. Police and Firemen's Salary Act of 1958. The power given under Section 471 of the 1974 Salary Act to the "the Council ... to change the rate of the taxes imposed under ... The

court's previous rulings in *Bishop* and *Califano*, the *Bender* Court concluded that "unlike the exclusion for personal services income, the Tax Act of 1947 specifically allowed for the taxation of *nonresident personal income* if that income is derived from the operation of an unincorporated business within the District of Columbia." Pet. Appx. 11a (*Bender*, 906 A.2d at 283-284) (emphasis added). The appellate court reversed and remanded the case for the entry of summary judgment in favor of the District of Columbia. Pet. Appx. 11a-12a (*Bender*, 906 A.2d at 284).

REASONS FOR GRANTING THE PETITION

I. The District of Columbia Court Of Appeals In *Bender* Decided An Important Question of Federal Law That Conflicts With A Decision Of The Virginia Supreme Court And Thus Results In Disparate Application Of A Federal Statute

A Writ of Certiorari should be granted because this case presents a conflict between the highest courts of the District of Columbia and Virginia concerning the interpretation of the Congressionally-enacted Home Rule Act: whether or not the ban on the imposition of "any tax" on nonresidents of the District Columbia prohibits the Council's imposition of the UB Tax on

---

District of Columbia Income and Franchise Act of 1947 ... [and other tax statutes]" is specifically based on the need "to provide for additional revenue" to cover increased salaries for teachers, policemen, and firemen. Pet. Appx. 45a. The 1974 Salary Act, which was effective prior to the effective date of the Home Rule Act, does not refer in any way to "non-residents", or even the UB Tax itself.

nonresidents. This case also presents an important legal issue concerning the proper scope of the Prohibition on taxing the personal income of nonresidents earning income in the District of Columbia, a question of federal law that has not been, but should be, settled by this Court. *See* Supreme Ct. Rule 10 (b), (c).

Under the rules and guidelines of this Court governing the exercise of certiorari, this Court may grant review of a case, in its discretion, when a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States Court of Appeals. Supreme Ct. Rule 10 (b). Compelling reasons exist in this case to grant the writ: the District of Columbia Court of Appeals and the Virginia Supreme Court have both reviewed a federal law - D.C. Code § 206.02 (a) (5) of the Home Rule Act - and its effect on the ability of the D.C. Council to impose a UB Tax in the form of a personal income tax on nonresidents, and the two courts have reached opposite results.

In 1997, the Virginia Supreme Court held that, for the purpose of determining whether Virginia residents would be entitled to a credit for UB Taxes paid to the District, the UB Tax was imposed by the D.C. Council and was "illegal and unauthorized under the District of Columbia's Home Rule Act ... ." *See Mathy v. Commonwealth of Virginia, Dept of Taxation*, 253 Va. 356, 483 S.E.2d 802 (1997), *cert. denied*, 522 U.S. 967 (1997). The Supreme Court of Virginia had previously reviewed the UB Tax in *King v. Forst*, 239 Va. 557, 391 S.E.2d 60 (1990), and concluded that it was an income tax. In *King*, the plaintiff was a Virginia taxpayer and the sole proprietor of an unincorporated printing business located in the District of Columbia. The court reviewed his claim that he was entitled to a credit under (former) Va. Code § 58.1-332 for payment of the UB Tax

in the District. The *King* Court held that the District's UB Tax was an income tax, not a franchise tax, and thus Virginia residents were entitled to a credit against their Virginia taxes for amounts paid to the District of Columbia. The *King* Court specifically relied on the principle of comity: that the interpretation of a particular jurisdiction's statute by its highest court should be followed by courts of other jurisdictions. 391 S.E.2d at 62 (*citing Elmendorf v. Taylor*, 10 Wheat. at 159, 6 L.Ed. at 292). Thus, the Virginia Supreme Court in *King* adopted the *Bishop* Court's interpretation and characterization of the UB Tax, and held that the UB Tax was an income tax. Like many other states, Virginia provides a credit against the individual income tax of Virginia residents for certain taxes paid to another state. Va. Code § 58.1-332. After the decision in *King*, the Virginia legislature in 1991 amended the relevant statute to deny a credit for certain taxes paid to another state which, if characterized as an income tax or a commuter tax, would be "illegal and unauthorized under such other state's controlling or enabling legislation . . . ." *Id.* at § 58.1-332. Accordingly, when the District's UB Tax again appeared before the Virginia Supreme Court in *Mathy*, although the court's analysis remained the same, the result for the taxpayer was different. In *Mathy*, the appellant was a Virginia resident and taxpayer, and a general partner in a District of Columbia real estate partnership. The partnership's sole source of income for the relevant years was rental income from the operation of an office building in the District. 483 S.E.2d at 802. The court in *Mathy* found that, consistent with the holdings in *King* and *Bishop*, the District's UB Tax is an income tax. Therefore, the court reasoned, the Mathys were entitled to a credit under the Virginia Code unless the UB Tax "would be illegal and unauthorized under such other state's controlling or enabling legislation." *Id.* at 804. The *Mathy* court then

analyzed whether the UB Tax would be "illegal and unauthorized under the District of Columbia's Home Rule Act," and concluded that it was. *See* 483 S.E.2d at 804-05. Accordingly, it denied the Mathys a credit against their Virginia taxes. *Id.* at 805. Significantly, neither the *King* nor the *Mathy* appellants were lawyers, professionals, or members of a service business. Like the Petitioners in the *Bender* case, the appellants in *Mathy* were partners in a real estate partnership whose income derived from rental income in the District of Columbia.

In direct conflict with the *Mathy* decision, the *Bender* Court held that the imposition of the UBT on certain nonresident businesses is permissible because the Home Rule Act does not act as a bar to *Congress'* taxing authority, and Congress established the UBT, albeit in 1947. As discussed in detail above, however, the holding in *Bender* also conflicts with prior rulings by the D.C. Court of Appeals on this issue, in particular the *Bishop* case. *See* 411 A.2d. at 998–999. In both the *Bishop* and the *Califano* opinions, the D.C. Court of Appeals viewed the Prohibition under the Home Rule act as affecting the *Council's* ability to impose a the UB Tax on nonresidents, even though the *original* 1947 Revenue Act, which had been enacted by Congress, provided for such a tax.

This Court has granted certiorari in other cases in which it found the conflict between two state courts on a federal law issue to be compelling. *See, e.g., Monge v. California,* 524 U.S. 721 (1998) (conflict among state courts as to standards for noncapital sentencing); *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Dept. of Ecology,* 511 U.S. 700 (1994) (conflict among courts of Washington state, Vermont, and New York concerning provisions of the Clean Water Act); *see also Guy v. Wisconsin,* 509 U.S. 914 (1993) (denying certiorari but noting in dissent that conflict

between Wisconsin Supreme Court and other state courts over police action in executing search warrant could warrant grant of certiorari). This Court also, in cases too numerous to detail here, has exercised its certiorari jurisdiction when a conflict exists among the federal circuit courts of appeals, or between state courts and a federal court of appeals. *See, e.g., Hubbard v. United States*, 514 U.S. 695 (1995) (split in circuits concerning meaning of text of federal statute warrants grant of certiorari); *Nichols v. United States*, 511 U.S. 738 (1994) (conflict among state courts and federal courts of appeals); *Braxton v. United States*, 500 U.S. 344 (1991) (granting certiorari, in part, due to conflict in circuit courts of appeals of interpretation of federal Sentencing Guidelines)[20]; *United States v. Dalm*, 494 U.S. 596 (1990) (granting certiorari when approach taken by sixth and ninth circuits conflicted with approach adopted by seventh circuit concerning doctrine of equitable recoupment of gift taxes); *United States v. Yermian*, 468 U.S. 63 (1984) (granting certiorari where ninth circuit opinion in conflict with three other federal circuits).

Indeed, this Court has found that resolving conflicts concerning federal law – among the federal circuits and between state courts of last resort – is among its most important functions. As Justice Scalia wrote in the *Braxton* case:

> A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve

---

[20] On review, the Supreme Court chose not to consider that question because the Sentencing Commission had "already undertaken a proceeding that will eliminate circuit conflict" on the challenged ground. However, the case proceeded to review on another issue. *Id.* at 348-49.

> conflicts among the Circuit courts of appeals and state courts concerning the meaning of provisions of federal law. [See this Court's Rule 10.] With respect to law apart from the Constitution, we are not the sole body that could eliminate such conflicts, at least as far as their continuation into the future is concerned. Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making an amendment to the statute, and agencies can do the same with respect to regulations. Ordinarily, however, we regard the task as initially and primarily ours.

Braxton v. United States, 500 U.S 344, 347-48 (1991).

Although this Court has not granted certiorari as frequently in cases that present a conflict between state courts of last resort (because previously there was an automatic appeal from state court decisions), it is important that it do so in this case. This Court previously denied certiorari in a case in which the District of Columbia, the Mayor, the Council, Council members and individual residents – brought an action challenging the constitutionality of the Prohibition in the Home Rule Act against imposing a commuter tax on nonresidents. *See Banner v. United States*, 303 F.Supp.2d 1 (2004) (dismissing suit with prejudice), *aff'd*, 483 F.3d 303 (D.C. Cir. 2005), *cert. denied*, 125 S.Ct. 2021, ___ U.S. ____ (2006). This Court also denied certiorari in both *Mathy*, 483 S.E.2d 802, *cert. denied*, 522 U.S. 967 (1997), in which the Virginia Supreme Court found the UB Tax to be illegal and unauthorized under Home Rule, and *Bishop*, 401 A.2d 955, *aff'd en banc*, 411 A.2d 997, *cert. denied*, 446 U.S. 966 (1980). Thus, this case – in which the holding directly conflicts with that of *Bishop* and *Mathy* – is ripe for review by this Court.

These disparate rulings (combined with the disparate state tax exemption/deduction treatment by the various states) impacts residents of different states differently – a result that could not have been intended by Congress when it enacted the Home Rule Act. Unlike many state and local jurisdictions, the District of Columbia imposes an unincorporated business tax in the form of an "entity-level income tax" on partnerships, LLCs and other unincorporated entities doing business in the District, even when such entities receive "pass through" treatment for federal income tax purposes, that is, when the income received form the business is passed through to the individual as personal income.[21] The District imposes the UB Tax at a high rate, currently 9.975 percent, annually on net income. *Id.* The UB Tax is not imposed on a few types of businesses that are exempt under the statute such as professional associations and personal service businesses, thus exempting doctors, lawyers and other professionals. The UB Tax is applied however to a wide range of unincorporated businesses such as real estate investors and real estate developers who do not qualify for the professional exemption under the statute. To avoid double taxation, it allows District of Columbia residents to exclude such income from their individual income taxes. Nonresidents of the District, however, are subject to the tax laws in their own states of residence in determining whether or not they are entitled to claim a credit for the amounts paid to the District as UB Taxes. Thus, nonresidents are potentially subject to disparate treatment (as compared to residents of the District, and other states), depending on whether the relevant state law, as was the case in *Mathy*, precludes a credit for an illegal tax.

---

[21] *See* Grosser, PWPS, State and Local Tax Bulletin, March (2006), at 1.

II. The District of Columbia Court Of Appeals In *Bender* Improperly Limited The Prohibition to Professional and Personal Services Thus Resulting In Unequal Treatment of Nonresident Unincorporated Business Owners Under The Federal Statute

The application of the Congressionally mandated Prohibition – to the extent that the *Bender* Court found it limited to professional and personal services businesses – results in disparate treatment of *different* classes of non-residents who own unincorporated businesses: for example, real estate investors are treated differently than lawyers or doctors. Petitioners submit that in interpreting the Home Rule Act's Prohibition as limited to certain classes of nonresidents, the *Bender* Court impermissibly sanctioned an application of the law by the Council that violates the right of equal protection guaranteed under the Fourteenth Amendment. *See, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S.Ct. 1676 (1985)(Alabama statute which taxes out-of-state businesses at a higher rate violates the equal protection clause). In *Metropolitan Life*, the challenged statute discriminated between resident insurance companies and nonresident insurance companies. Here, not only is the impact of the UB Tax statute potentially discriminatory between residents of various states, but it also discriminates (as applied by the *Bender* Court) between nonresidents who are engaged in professional services and those who are not. There is simply no rational basis for this distinction, especially given the Home Rule Act's broad language which bars the District of Columbia from imposing "any tax" on the personal income of a nonresident. Thus, the *Bender* decision presents an important issue of federal law which has not been, but

should be, decided by this Court. Supreme Court Rule 10(c).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

DALE A. COOTER
Counsel of Record
DONNA S. MANGOLD
COOTER, MANGOLD, TOMPERT
& KARAS, L.L.P.
5301 Wisconsin Avenue, N.W.
Suite 500
Washington, D.C. 20015
(202) 537-0700
Attorneys for Petitioners Kenneth Bender, et al.

(any footnotes trail end of each document)
Nos. 06-TX-255 & 06-TX-294
DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA, APPELLANT,

v.

KENNETH BENDER, et al., APPELLEES.

June 28, 2006, Argued
August 24, 2006, Decided

COUNSEL: James C. McKay, Jr., Senior Assistant Attorney General for the District of Columbia, with whom Robert J. Spagnoletti, Attorney General for the District of Columbia, and Todd S. Kim, Solicitor General, were on the brief, for appellant.

Gerald H. Sherman, with whom Richard S. Marshall and David H. Dickieson were on the brief, for appellees.

JUDGES: Before WASHINGTON, Chief Judge, FISHER, Associate Judge, and BELSON, Senior Judge.

OPINION BY: BELSON

OPINION: BELSON, *Senior Judge*: Appellant District of Columbia appeals from the trial court's March 8, 2006, decision that granted appellee taxpayers' Cross-Motion for Summary Judgment and its subsequent order of March 24, 2006, granting appellees a refund of unincorporated business franchise taxes ("UB Taxes") paid in the amount of $ 241,815. We

disagree with the trial court's holding that Title 47, D. C. Code Enactment Act of 1996 ("Enactment Act of 1996") violated the provisions of the Home Rule Act by permitting the Council of the District of Columbia to impose the UB Tax on the personal income of a real estate partnership's nonresident partners, and reverse.

I.

Background

Appellees, residents of the states of Montana, Florida, and Maryland, are partners in four partnerships which generate rental income from real estate located in the District of Columbia. Appellees paid UB Tax totaling $ 241,815 for the calendar years ending December 31, 1999-2000, and the fiscal years ending September 30, 2000-2002, for the four real estate partnerships. Appellees' timely refund claims for these periods were denied, and the District of Columbia Office of Tax Appeals denied their subsequent appeals. Appellees then filed suit in the Superior Court of the District of Columbia seeking refunds of the amounts paid. Both parties filed motions for summary judgment. The Superior Court granted appellees' motion for summary judgment and denied appellant's motion for summary judgment. The trial court held that the UB Tax could not be imposed on any unincorporated business income if "that net income is to be distributed to the nonresidents directly and personally" because the Enactment Act of 1996 "carried forward the prohibiting effect of [the] Home Rule Act['s]" ban on the taxation of personal income of nonresidents of D.C. This timely appeal followed.

II.

The Status of the Law Applicable in the District of Columbia

A. District of Columbia Income and Franchise Act of 1947

Congress enacted the District of Columbia Revenue Act of 1947 which, *inter alia*, imposed an income tax on D.C. residents and resident estates and trusts and "a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District . . . ." District of Columbia Income and Franchise Tax Act of 1947, Pub. L. No. 80-195, ch. 258, 61 Stat. 328, 349 (codified at D.C. Code § 47-1810.01 (a)(2) (2001)) (hereinafter "Tax Act of 1947"). It specifically provided that "for the purposes of this article . . . the words 'taxable income' mean . . . that portion of the entire net income of every nonresident which is subject to tax under title VIII of this article [Tax on Unincorporated Businesses]." 61 Stat. at 643. Congress initially set the tax rate at 5.0% per annum and raised it several times. 61 Stat. at 346. In addition, Congress established that the UB Tax would "be payable by the person or persons, jointly and severally, conducting the unincorporated business. The taxes . . . may be assessed in the name of the unincorporated business or in the name or names of the person or persons liable for the payment of such taxes, or both." 61 Stat. at 346 (codified at D.C. Code § 47-1808.05 (2001)).

B. The Home Rule Act

In 1973, Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act. Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified at D.C. Code § 1-201.01 et seq.) (hereinafter "Home Rule Act"). The purpose of this legislation was to allow Congress to maintain its legislative power over the District of Columbia, as provided by the U.S. Constitution, but allow residents to elect local officials while creating a tripartite form of government with limited legislative powers. § 102 (a), 87 Stat. at 777 (codified at D.C. Code § 1-201.02 (2001)). With respect to the Council's taxation powers, Congress mandated that

> SEC. 602. (a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to –
>
> . . .
>
> (5) impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District . . . .

§ 602 (a)(5), 87 Stat. at 813 (codified at D.C. Code § 1-206.02 (a)(5) (2001)). In addition, the Home Rule Act provided:

> (b) No law or regulation which is in force on the effective date of Title IV of this Act [January 2, 1975] shall be deemed amended or repealed by this Act except to the extent specifically

> provided herein or to the extent that such law or regulation is inconsistent with this Act, but any such law or regulation may be amended or repealed by act or resolution as authorized in this Act, or by Act of Congress ....

§ 717 (b), 87 Stat. at 820 (codified at D.C. Code § 1-207.61 (2001)). Further, the Home Rule Act stated:

> Sec. 761. To the extent that any provisions of this Act are inconsistent with the provisions of any other laws the provisions of this Act shall prevail and shall be deemed to supersede the provisions of such laws.

§ 761, 87 Stat. at 836 (codified at D.C. Code § 1-207.61 (2001)).

C. Act of September 3, 1974

On September 3, 1974, Congress enacted legislation that provided that the Council was "authorized to change the rate of the taxes imposed under -- (1) the District of Columbia Income and Franchise Tax Act of 1947." Act of Sept. 3, 1974, Pub. L. No. 93-407, § 471 (1), 88 Stat. 1036, 1064. This legislation further stated that

> SEC. 501. Notwithstanding any other provision of law, or any rule of law, nothing in this Act shall be construed as limiting the authority of the Council of the District of Columbia to enact any act, resolution or regulation, after January 2, 1975, pursuant to the District of Columbia Self-Government and Governmental Reorganization

> Act with respect to any matter covered by this Act.

§ 501, 88 Stat. at 1066.

This legislation was passed after the enactment of the Home Rule Act but before the elected Mayor and Council took office. Thus, the Council referred to in the legislation was the nine-member Council appointed by the President of the United States. *See* Reorganization Plan No. 3 of 1967, 32 Fed. Reg. 11669 (Aug. 11, 1967), *reprinted in* 1 D.C. Code at 125 (2001), *and in* 81 Stat. 948 (1967). Reorganization Plan No. 3 gave the appointed Council authority to determine the amount of net income subject to tax under the Tax Act of 1947; withhold tax; and establish rules and regulations to enforce the Tax Act of 1947. *Id.* The Home Rule Act did not abolish the Council's right to perform these functions. *See* 404 (a), 87 Stat. at 787 ("all functions granted to or imposed upon, or vested in or transferred to the District of Columbia Council, as established by Reorganization Plan Numbered 3 of 1967, shall be carried out by the Council in accordance with the provisions of this Act"). Thus the authority of the appointed Council to change the rate of tax imposed under the Tax Act of 1947 was transferred by the Home Rule Act to the new elected Council.

D. Title 47, D.C. Code Enactment Act of 1996

Title 47, D.C. Code Enactment Act of 1996 became effective on April 9, 1997. D.C. Law 11-254, 44 D.C. Reg. 1264 (1997). This legislation served as "a purely technical measure to enact Title 47 of the District of Columbia Code (Taxation and Fiscal Affairs) . . . [and]

includes strictly technical amendments to Title 47, such as clarifying erroneous cross references, [and] correcting grammatical errors." REPORT OF THE COMMITTEE OF THE WHOLE, COUNCIL OF THE DISTRICT OF COLUMBIA ON BILL 11-865, THE "TITLE 47, D.C. CODE ENACTMENT ACT OF 1996," at 1 (1996) (hereinafter Committee Report). A review of the changes made to D.C. Code §§ 47-1808.1 through 47-1808.7, the code sections pertaining to the UB Tax, indicate that there were no substantive changes made -- only grammatical changes. COMMITTEE REPORT at 37-38.

E. Case Law

This court has previously held that the UB Tax is a tax "levied upon personal income." *Bishop v. District of Columbia*, 401 A.2d 955, 961 (D.C. 1979), *reinstated en banc*, 411 A.2d 997, *cert. denied*, 446 U.S. 966, 100 S. Ct. 2943, 64 L. Ed. 2d 825 (1980).[1] This court concluded that the Council's imposition of a tax on nonresident, unincorporated professionals and personal services businesses violated the Home Rule Act because "the tax burdens the taxpayer personally." *Bishop*, 401 A.2d at 961. However, the court expressly declined to extend this holding to the taxation of "nonresident professionals who operate an unincorporated business." *Id.* In *District of Columbia v. Califano*, 647 A.2d 761, 765 (D.C. 1994), this court held "that the New York unincorporated business tax is an individual income tax." The *Califano* court concluded that the New York tax "operates the same way [as the UB Tax]," relying on Bishop, supra, 401 A.2d at 961 n.18. 647 A.2d at 763. Neighboring jurisdictions have taken the view that the UB Tax is an income tax and not a franchise tax, based

on this court's decisions in *Bishop* and *Califano*. *See Roach v. Comptroller of the Treasury*, 327 Md. 438, 610 A.2d 754, 759 (Md. 1992); *Mathy v. Commonwealth*, 253 Va. 356, 483 S.E.2d 802, 805 (Va. 1997).[2]

III.

Discussion

Appellees assert that the D.C. government is prohibited from enforcing the Tax Act of 1947 because the Home Rule Act prohibits the Council from imposing any tax on the personal income of nonresidents, and that the Home Rule Act repealed the provisions of the Tax Act of 1947 that imposed the UB Tax on nonresidents. On the other hand, appellant contends that the Tax Act of 1947 was not amended or repealed by the Home Rule Act but remains in effect because Congress retained its legislative power over the District under the Constitution despite the enactment of the Home Rule Act.

"This court reviews both trial court decisions granting summary judgment and questions of statutory interpretation *de novo*." *District of Columbia v. Place*, 892 A.2d 1108, 1110-11 (D.C. 2006). We first look at the language of a statute to interpret a statute. *Jeffrey v. United States*, 892 A.2d 1122, 1128 (D.C. 2006). "We are required to give effect to a statute's plain meaning if the words are clear and unambiguous." *Id.* (citation omitted). "The literal words of a statute, however, are not the sole index to legislative intent, but rather, are to be read in the light of the statute taken as a whole, and are to be given a sensible construction and one that would not work an obvious injustice." *Id.* (internal

quotations and citations omitted).

The Home Rule Act amended or repealed Acts of Congress prior to January 2, 1975, to the extent they were inconsistent with the Home Rule Act. 717 (b), 87 Stat. at 820. We conclude that there was no inconsistency between the Home Rule Act and the Tax Act of 1947 because Congress, in the Tax Act of 1947, provided that there would not be a tax on the personal income of nonresidents but in the same legislation enacted the unincorporated business tax that had the effect of taxing that portion of the personal income of nonresident owners of unincorporated businesses derived from those businesses. 61 Stat. at 343, 345. Having imposed the tax, 61 Stat. at 345, Congress gave the authority to the Council to promulgate rules and regulations to determine the apportionment of the UB Tax, collect the UB Tax, see discussion *supra* Part II. C., and establish the UB Tax rate, 471 (1), 88 Stat. at 1064.[3] The legislation which authorized the Council to establish the UB Tax rate was enacted in September 1974, approximately nine months after the passage of the Home Rule Act in December 1973 but before the Home Rule Act became effective in January 1975. This sequence of events demonstrates that Congress had not repealed the Tax Act of 1947 by enacting the Home Rule Act. By giving the Council the right to determine the rate, Congress made it clear that the UB Tax remained in effect.[4]

Appellees also argue that the Tax Act of 1947 was repealed by the Home Rule Act and improperly reenacted by the Council via the Enactment Act of 1996. This argument is misplaced since the purpose of the later legislation was to "clean-up" Title 47 of the

D.C. Code. See discussion *supra* Part II. D. The provisions for the imposition of the UB Tax were already contained within the D.C. Code based on the provisions of the Tax Act of 1947 at the time the Home Rule Act was enacted. *See In re WPG, Inc.*, 282 B.R. 66, 69 (D.D.C. 2002) (Urbina, J.) (holding that the Council's recodification of the District of Columbia Revenue Act of 1949 did not alter the nature of the law "as an Act of Congress" and thus the codified version has the same meaning as the statute). The Home Rule Act did not amend or repeal those provisions of the D.C. Code.[5]

Appellees contend that if this court should reverse the decision of the trial court, it would overrule the conclusions of the *Bishop* and *Califano*[6] courts. In *Bishop, supra,* this court concluded that the Council's adoption of the Revenue Act of 1975, codified at D.C. Code § 47-1574 (1973), repealed the "professional exemption" established in the Tax Act of 1947. 401 A.2d at 955. The Council's challenged action allowed the D.C. government "to impose an unincorporated business tax upon unincorporated professionals and personal service businesses." *Id.* (internal footnote omitted). The court held that the tax was "levied upon personal income" and that the tax constituted a tax on "the net personal income of nonresidents," contrary to the provisions of the Home Rule Act. *Id.* at 961 (internal footnote omitted).

The trial court here, however, failed to distinguish *Bishop* from the instant case. The problem addressed in *Bishop* was that the Council had exceeded its power conferred by Congress by actually purporting to repeal the Congressionally imposed "professional services" limitation. In substance, this court in *Bishop* held that

the Council could not repeal a provision of the Tax Act of 1947 which excluded from the tax certain types of personal service income.[7] 401 A.2d at 956-58. The *Bishop* court did not say that the District was precluded from taxing nonresidents "who operate an unincorporated business." *Id.* at 961. Conversely, in the instant case, the Council has not taken any action to amend the Tax Act of 1947 enacted by Congress; the Council has merely continued to exercise the power conferred by Congress to collect a tax imposed by Congress. The Tax Act of 1947 mandated that the UB Tax was payable by the individuals operating the unincorporated business. 61 Stat. at 346 (codified at D.C. Code § 47-1808.05 (2001)). Moreover, the UB Tax was not defined solely as a tax on residents but was specifically defined by Congress to include "that portion of the entire *net income* of every *nonresident* which is subject to tax under title VIII [Tax on Unincorporated Businesses] of this article." 61 Stat. at 343 (codified at D.C. Code § 47-1806.01 (2001)) (emphasis added). Thus, unlike the exclusion for personal services income, the Tax Act of 1947 specifically allowed for the taxation of nonresident personal income if that income is derived from the operation of an unincorporated business within the District of Columbia. *Cf. District of Columbia v. Helen Dwight Reid Educ. Found.*, 766 A.2d 28, 37 (D.C. 2001) (concluding that D.C. Code 47-1002 (1997), enacted by Congress, did not "offend the dormant commerce clause" because Congress is not precluded from burdening interstate commerce even when Congress enacts legislation for the District under its Constitutional powers).

We therefore reverse the decision of the trial court and remand with instructions to enter summary judgment

for appellant.

So ordered.

Footnotes

n1 The en banc court "underscore[d] the division opinion's holding . . . [but] also emphasize[d] the limits of that holding." *Bishop*, 411 A.2d at 998.

n2 The Virginia Supreme Court concluded that the UB Tax was "illegal and unauthorized under the Home Rule Act." *Mathy, supra*, 483 S.E.2d at 805. Its ruling is not binding on this court.

n3 Appellees argued before the trial court that the Home Rule Act's prohibition on the imposition of any tax on nonresidents also applies to the Council's authority over the District's Department of Finance and Revenue's (now the Office of Tax and Revenue) "application" of the Tax Act of 1947. In light of our holding in this case that the Home Rule Act did not repeal the Tax Act of 1947, we likewise conclude that such prohibition does not extend to the Office of Tax and Revenue's "application" of the UB Tax. On appeal, appellees mention in a footnote in their brief that the Council delegated its authority to determine rules and regulations related to income and franchise taxes to the Mayor pursuant to D.C. Law 4-131, 107, 29 D.C. Reg. 2418, 2422 (1982). Appellees posit that "it is questionable whether the Council had authority to delegate authority that originally had been delegated to it by Congress" but that, in any event, such re-delegated authority was abolished by the Home Rule Act. Appellees did not advance in the trial court the argument that the Council's authority to delegate was

questionable, and their brief on appeal cites no legal authority to support that argument, merely stating that the Council's authority was questionable. Therefore, we decline to address it. *Cf. District of Columbia v. Place*, 892 A.2d 1108, 1112 n.2 (D.C. 2006).

n4 The trial court's opinion discusses neither the substance of the Act of September 3, 1974, nor the timing of this legislation relative to the Home Rule Act. Nor does appellees' brief address the impact of this later legislation on the continued existence of the UB Tax as imposed by Congress in the Tax Act of 1947. Instead, both the trial court's order and appellees engage in a discussion about purported distinctions between the terms "impose" and "enact" to bolster their positions that the Home Rule Act prohibited the imposition of the UB Tax by the Council. In light of Congress' enactment of the Act of September 3, 1974 after the passage of the Home Rule Act and the specific language of that legislation stating that the Council "is authorized to change the rate of the taxes *imposed* under [the Tax Act of 1947]," this argument is unavailing. § 471 (1), 88 Stat. at 1064 (emphasis added).

n5 Appellees do not cite to any legislation other than the Home Rule Act to support their argument that the Tax Act of 1947 has been repealed.

n6 Our holding in *Califano* does not require separate discussion, as it was based entirely on our conclusions in *Bishop*.

n7 The Tax Act of 1947 provided:

The words "unincorporated business" do not include any trade or business which by law, customs, or ethics cannot be incorporated or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income-producing factor.

61 Stat. at 345-46.

Filed:
Tax Docket No. 8524-05
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

KENNETH BENDER, et al. Petitioners,

v.

DISTRICT OF COLUMBIA, Respondent.

Judge Jose M. Lopez

ORDER

Before the Court are the following documents: the Respondent's Motion for Summary Judgment, filed on July 7, 2005 ("Government's Motion"); the Petitioners' Cross-Motion for Summary Judgment filed, on September 6, 2005 ("Petitioners' Cross Motion"); the Respondent's Memorandum of Points and Authority in Opposition to Petitioners' Cross-Motion for Summary Judgment and in Reply to Petitioners' Opposing the Government's Motion for Summary Judgment, filed on October 26, 2005 ("Government's Reply"); and the Petitioners' Reply in Support of Cross-Motion for Summary Judgment, filed on December 1, 2005 ("Petitioners' Reply"). After careful review of the motions and memoranda, and due consideration to the arguments of counsels, heard on January 4, 2006, the Petitioners' Cross-Motion for Summary Judgment is granted.

BACKGROUND

Petitioners Kenneth Bender, Lisa Bender-Feldman, Scott Bender, and Jay Bender are each members of the following unincorporated businesses: Jack I. Bender and Sons ("Bender & Sons'; Northwestern Development Company "B" ("Northwestern Co."); Rhode Island and M Associates ("Rhode Island Assoc."); and Twelfth and L Streets Limited Partnership ("Twelfth LP").

Each petitioner has duly filed and paid District of Columbia unincorporated business tax ("UB tax") for the four unincorporated businesses in the following manners: Twelfth LP filed UB tax returns on a calendar year basis[1] for the years ending on December 31, 1999, 2000, 2001 and 2002; the remaining three UB's filed returns on a fiscal year basis[2] for the years ending September 30, 2000, 2001 and 2002. In sum, Kenneth Bender paid $60,446.00, Scott Bender paid $60,464.00, Jay Bender paid $60,459.00 and Lisa Bender-Feldman paid $60,446.00 for a total tax of $241,815.00.

The Petitioners are seeking a full UB tax refund on the grounds that the District's UB tax violates the prohibition on the imposition of any tax on the personal income of any non-resident of the District set forth in D.C. Code § 1-206.02(x)(5) (2001). The District's position is that the UB tax is a permissible federally created franchise tax "for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District." D.C. Code § 47-1810.01(x)(2) (2001)[3]

ANALYSIS

The Court has original jurisdiction over this matter

pursuant to D.C. Code § 473310(b).

Summary judgment is proper "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Super. CL Civ. R 56(c). The moving party has the burden of demonstrating both the absence of a genuine issue of material fact and that they are entitled to judgment as a matter of law. *Griva v. Davison*, 637 A.2d 830, 836 (D.C. 1994) (citing *Holland v. Hannan*, 456 A.2d 807, 815 (D.C. 1983)). To overcome summary judgment the opposing party must offer "competent evidence admissible at trial showing that there is a genuine issue to material fact" *Nader v. de Toledano*, 408 A.2d 31, 48 (D.C.1979), *cert. denied*, 444 U.S. 1078 (1979).

Both parties agree that the issues in dispute are purely legal and not factual ones, which are amenable to this Court's summary disposition.

Congress Empowered the District of Columbia Council to Impose UB Tax and Congress Limited the Council to Impose UB Tax on the Personal Income of the Nonresidents of the District

Congress empowered the District of Columbia Council ("Council") to impose UB tax generally, while limited the Council's power to impose UB tax on the personal income of the nonresidents of the District.

Congress' power to legislate for the District of Columbia is expressly delegated by the Constitution.

U.S. Const art. 1, § 8, cl. 17; *Neild v. D. C.*, 110 F.2d 246, 249 (D.C. Cir. 1940). When Congress legislates for the District, Congress acts as a legislature of national character, exercising legislative control as contrasted with the limited power of a state legislature. *In re WPG, Inc.*, 282 B.R 66, 69 (D.D.C. 2002) (citing *Neild*, 110 F.2d at 250). Congress enacted the Revenue Act of 1947 for the District, Pub. L. No. 80-195, 61 Stat. 328 (1947), wherein Article 1, the Income and Franchise Tax Act ("1947 Tax Act"), enacted a tax, *inter alia*, on *unincorporated* businesses "for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from source within the District." Title VIII, § 3, 61 Stat. 336, 354 (1947). The Act defined "unincorporated business" ("UB") as "any trade or business, conducted or engaged in by any individual, whether resident or nonresident, .." Title VIII, § 1, 61 Stat. 336, 353-354 (1947). Undoubtedly, Congress legislated the UB tax.

By 1973, however, Congress enacted the D.C. Self-Government and Governmental Reorganization Act ("Home Rule Act"), Pub. L. 93-198, 87 Stat. 777 (codified as amended at D.C. Code § 1-201, *et seq.* (2001 ed.)), with the intent "to delegate certain legislative powers to the government of the District of Columbia, ... and, to the greatest extent possible, ... relieve Congress of the burden of legislating upon essentially local District matters." D.C. Code § 1-201.02 (a); *Convention* Ctr. *Referendum Comm., et al. v. D. C. Bd. of Elections and Ethics, et al.*, 441 A.2d 889, 903 (D.C. 1980); *Banner v. U.S.*, 303 F. Supp. 2d l (D.D.C. 2004). The Home Rule Act provided for a council to legislate for the District, and a mayor to execute and enforce the

law governing the District. D.C. Code § 1-204.01, *et seq.*; *Banner*, *supra*, 303 F. Supp. 2d at 4. In particular, the Home Rule Act provided that "all functions granted to or imposed upon, or vested in or transferred to the District of Columbia Council, as established by the Reorganization Plan Numbered 3 of 1967, shall be carried out by the Council in accordance with the provisions of [the Home Rule Act]." D.C. Code § 1-204.04 (a). And in the Reorganization Plan Number 3 of 1967 § 402 (371), Congress specifically vested in the Council the authority to "[prescribe] regulation or regulations for determining under formula or formulas provided therein the portion of net income subject to tax under the District of Columbia Income and Franchise Tax Act of 1947." 32 F.R. 11669, 81 Stat. 948 (1967). Congress thereby grafted the regulating function of the UB tax from the 1947 Tax Act ("UB regulatory authority") and transferred it to under the Council's control.

The Council's UB regulatory authority is "[s]ubject to the retention by Congress of the ultimate legislative authority over the nation's capital." D.C. Code § 1-201.02 (a); *Banner*, *supra*, *303* F. Supp. 2d at 4. "Notwithstanding any other provisions of this chapter, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this chapter, including legislation to amend or repeal any law in force in the District prior to or after enactment of this chapter and any act passed by the Council." D.C. Code § 1-206.01. Congress enacted the Home Rule Act with these provisions to safeguard its

ultimate legislative control. *Banner, supra, 303 F.* Supp. 2d at 5. But until such time Congress exercises its ultimate authority differently, Congress, through the Home Rule Act, has said that the regulating function of the UB tax as created under the 1947 Tax Act was now for the District to exercise.

In addition, the Council's exercise of its UB regulatory authority is subject to the prohibition that the Council shall not "impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District... ." D.C. Code § 1-206.02 (a)(5) ("Prohibition"). The Home Rule Act "limits the Council's lawmaking power, enumerating matters that are not 'rightful subjects of [Council) legislation.'" *Banner, supra, 303* F. Supp. 2d at 8-9. In giving effect to the Prohibition, the District of Columbia Court of Appeal more recently in *Banner* upheld a bar against the Council's attempt to impose a D.C. commuter tax. And earlier in *Bishop v. D.C.*, the court likewise took notice of the Prohibition and upheld a bar against the Council from taxing nonresident professionals. 401 A.2d 955 (D.C. 1979), aff'd *en banc*, 411 A.2d 997, *cent. denied*, 446 U.S. 966 (1980). Thus, as Petitioners argues, the Council holds legislative control over the UB tax that is not immune to the application of the Prohibition. (Petitioners' Cross-Motion, Mem. of P. & A. at 24-25.) Consequently, the Government's contention that Congress exclusively controls UB taxation whereby the District administers it only (Government's Reply at 78) understated the meaning and effects of the Home Rule Act with respect to the 1947 Tax Act.

Moreover, when construing the 1947 Tax Act and the

subsequent Home Rule Act, "[t]o the extent that any provisions of [the Home Rule Act] are inconsistent with the provisions of any other laws, the provisions of [the Act) shall prevail and shall be deemed to supersede the provisions of such laws." D.C. Code § 1-207.61 (a). Where conflict exists between whether it is Congress or the Council regulating the UB tax, the Home Rule Act supersedes the 1947 Tax Act. So to the extent that the 1947 Tax Act enabled Congress to regulate the UB tax, the transfer of that function to the Council in the Home Rule Act superseded it. Congress made no exception for its own exercise of the regulatory authority over the UB tax, see Reorganization Plan Number 3 of 1967, 32 F.R 11669, 81 Stat. 948 (1967); there are no two legislating bodies regulating the UB tax. Hence, if taxation on a UB would have the effect of taxation on the personal income of nonresidents, it would be the Council's authority that gave that effect, which would in tam be subject to the Prohibition.

The cornerstone of the Government's position is that "Congress, legislating for the District of Columbia, imposed a tax on the District-derived income of UBs, whether or not the members of the UB who are liable for the tax were District residents." (Government's Reply at 4.) "Congress, not the Council, enacted the UB tax, prohibition on the Council does not apply." (Government's Reply at 11.) While "enacting" a tax can be construed as "imposing" a tax, the Government seems to be reading the two words synonymously to the exclusion of any other meanings. (Government's Reply at 10.) In Home Rule Act § 602, Congress clearly distinguished "enacting" from "imposing". D.C. Code § 1-206.02 (a). For example, Congress shall not "impose any tax on property of the United States or any of the

several states", and shall not "enact any act, resolution, or regulation with respect to the Commission on Mental Health". D.C. Code §§ 1-206.02 (a)(1), (7) (emphasis added). In addition, "imposing" is not just "exacting", "enforcing" or "collecting" a tax, a function that Congress delegated to the Mayor of the District of Columbia under Home Rule Act § 422, else several provisions of Home Rule Act § 602 would be superfluous. See D.C. Code §§ 1-204.21-24,1-206.02. "Congress legislated with care." Palmroe v. U.S., 411 U.S. 389 (1973). Congress carefully crafted the Home Rule Act to grant the Council an authority to regulate and not to enact UB tax; it would follow that Congress only needed to restrict the Council's authority to impose and not to enact. The Prohibition on the Council's regulatory authority with respect to UB taxation does apply.

Therefore, the principal legal issue here becomes whether the tax on the unincorporated businesses can also be a tax on the personal income of the nonresidents engaging or conducting the businesses. And the analysis with respect to the nature and effect of the UB tax in *Bishop is* relevant.

The District of Columbia Court of Appeal's Holdings in Bishop and Califano Determined That UB Tax Is An Income Tax Subject To Limitalion of *Home Rule Act* f *602 (a) (5)*

The nature and effect of the UB tax as analyzed in *Bishop* shows that UB tax as the Council imposes today burdens nonresidents personally.

From *Bishop*, we learned that the UB tax has been

construed as an income tax. supra, 401 A.2d at 960. "As to the characterization of a tax, it is fundamental that the nature and effect of a tax, not its label, determine if it is an income tax or not." *Bishop, supra,* 401 A.2d at 958. "Franchise taxes can be considered property taxes, excise taxes, gross income taxes, and most importantly, income taxes depending on the incidents of taxation." Id. at 959. And "[t]o the extent that we deal with individuals who are professionals and are not protected by corporate veil, we must find that the [unincorporated business] tax burdens the taxpayer personally." *Id.* at 961. Taking *Bishop's* analysis a step further, the pertinent question now is whether to a broader extent when we deal with other nonresident individuals composing an unincorporated business, like Petitioners, the UB tax also burdens them personally.

The *Bishop* analysis focused on whether the UB tax was, regardless of its franchise tax label, a tax imposed on the personal income of the nonresident associates and professionals of unincorporated professionals and personal service businesses ("professional and personal UBs"), thus prohibited by the Home Rule Act § 602 (a)(5). *See Id. at* 956. The court took a two-part approach.

One, the *Bishop* court analyzed and found that the District's UB tax has the incident and effects of an income tax. UB tax levies upon "the amount of net income derived from sources within the District" D.C. Code § 47-1808.02 (1). When a jurisdiction taxes net income, it is in effect taxing the consumable wealth or the disposable income of its taxpayers. *Bishop, supra,* 401 A.2d at 959-960. Such tax is not systematically applied to all unincorporated businesses for the

privilege of carrying or engaging in a trade or business within the District, but is more particularly applied to the income earning capacity of the businesses. Id. at 960, 961 n.18. The *Bishop* court thus reasoned, the District's UB tax has the incidents and effect of an income tax. Id.

The other, the *Bishop* court applied and concluded that income tax on a professional and personal UB is a tax on the personal income of the associates or professionals composing the UB entity. To repeal the professional exemption would cause a professional to "be subject to double tax on the net income for his practice." *Bishop, supra,* 401 A.2d at 957 (citing H.R. Rep. No. 92-508, at 4 (1971)). Any designation of wages paid from the net income to the associates and partners of professionals and personal UBs was generally artificial with no significant relation to the actual income earned. Id. at 961. The UB tax on the business net income "in reality" burdens the taxpayers personally "[t]o the extent that we deal with individuals who are professionals and are not protected by the corporate veil." Id.

On *Bishop*, the Government made its brief argument that Congress intended to exempt UB taxation on professional and personal UBs when capital was not a material income-producing factor for these businesses. (Government's Reply at 11 n. 4.) The law does state that "[t]he term 'unincorporated business' does not include: ... any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individuals ... ." D.C. Code § 47-1808.01 (3); *see Rohrbaugh v. D. C.*, 225 F.2d 264 (D.C. Cir. 1955). However, there is a

distinction between a business excluded from UB taxation and a business subject to UB taxation but in a limited scope. Here, Petitioners are not denying that their businesses are unincorporated entities subject to taxation. (Petitioners' Cross-Motion, Mem. of P. & A. at 4.) Rather, Petitioners are contending that the UB tax as imposed taxed on their personal income, which the Prohibition prohibited. (Petitioners' Cross-Motion, Mem. of P. & A. at 6).

As for the Prohibition, "Congress expressly and specifically withheld the District of Columbia Council's authority to impose a tax on the income of nonresidents." *Bishop v.* D. C, 411 A.2d 997, 999 (D.C. 1980), *cert. denied*, 446 U.S. 966 (1980). The withholding includes "the whole or any portion of the personal income, *either directly or at the source thereof*. D.C. Code § 1-206.02 (a)(5) (emphasis added). This Court fords the dual references of "directly" and "at the source thereof' significant. Prior history has already revealed that the District cannot impose a tax directly on the nonresident commuter's personal income he earned from coming to work in the District, and the District cannot impose a tax at the source o£ a nonresident professional's personal income such as a professional unincorporated business. *See Banner, supra*, 303 F.Supp. 2d 1; *Bishop, supra*, 401 A.2d 955. The Government cannot now reinterpret Congress' intent by summarily characterizing the UB tax as a tax solely on the net income of an UB entity without acknowledging the impact of its pass-through effect on the individuals composing the entity, who receive their income from the net income of the UB entity. Accordingly, the *Bishop court's* holding, though carefully limited, nonetheless has a broader implication.

The threat of double tax is the same to the nonprofessionals as it is to the professionals. *See Bishop, supra*, 401 A.2d at 957. The taxable nature of personal income is the same regardless whether the income is received as an actual or artificial wage, a bonus, a distribution or another designation. *See Id. at* 961. And although the *Bishop* court also touched upon the professionals as not being protected by a corporate veil, Id. at 961, in reality the professionals may and are often shielded by veils of other non-corporation business forms. Consequently, the emphasis is less on the form of the unincorporated business or whether it is protected from liabilities, but much more on the incidents and the effect of the UB tax on the individuals forming the business entity.

The authors of the Prohibition anticipated this broader reading of "personal income". During the Senate hearings on the Home Rule Act, the Committee Chairman, Senator Thomas Eagleton said, "[t]here is a specific prohibition as to the imposition of a commuter tax, a reciprocal income, or any other tax on non-residents of the District of Columbia." 117 Cong. Rec. 42498 (1971); *Bishop, supra,* 411 A.2d at 998. Representative Breckenridge of Kentucky also said, and Congressman Gude of Maryland concurred, that 'personal income tax' of the Prohibition is "precluding any tax which is based on a percentage of income regardless of whether it is technically considered personal income ... ." Home Rule for the District of Columbia, 1973-1974: Background and Legislative History of H.R. 9056, H.R. 9682 and Related Bills Culminating in The District of Columbia Self-Government and Governmental Reorganization Act, at 1126 (1974); *Bishop, supra,* 411 A.2d at 998. And as the

District of Columbia Court of Appeal in D.C. v. Califano put in another way, the "individual income tax" is not "a term of art with a narrow, specialized meaning," rather the term "cannot rationally denote anything other than an income tax paid by an individual. " 647 A.2d 761, 764-765 (D.C. 1994). Congress intended to construe the "personal income ... of an individual" in the Prohibition more broadly than narrowly, its application is not limited to just the nonresidents of professionals and personal UBs.

Petitioners' reference to the State and Local Fiscal Assistance Act of 1972 to advance a definition for "personal income" is further helpful. (Petitioners' Cross-Motion, Mem. of P. & A. at 13-15.) Congress had defined "personal income" as "the income of individuals, as determined by the Department of Commerce for national income accounts purposes." State and Local Fiscal Assistance Act of 1972, P.L. 92-512 (1972). And in the legislative history of this Act, Congress explained that "personal income is the current income received by persons from all sources, ... Personal income is measured on a before-tax basis, and is the sum of wage and salary disbursements, other labor income, proprietors' income, rental income of persons, dividends, personal interest income, ..." S. Rep. No. 1050, 92d Cong., 2d Sess. 32 (1972). Thus, the "personal income... of an individual" in the Prohibition extends pass the personal net income of the professionals in *Bishop* to include personal net income of the unincorporated business owners like the Petitioners.

Accordingly, the Court holds that the Prohibition does effectively limit the Council's exercise of its UB regulatory authority to impose upon any UB net

income to the extent that the UB distributes directly to the nonresident individuals, whether professionals or otherwise. The Court is mindful of the gravity of this holding. Just as the *Bishop* court cautioned, the Court's holding here should not be construed to proscribe the District's imposition of UB tax. Nor is the Court's holding here be construed to proscribe the District's imposition of UB tax on the personal income of residents of the District, or to prohibit the Council's legislation of UB tax on an unincorporated business that is engaged by nonresidents of the District.

D. C. Enactment Act of 1996 Does Not Change the Nature, Meaning or Effect of the Income and Franchise Act of the Revenue Act of 1947 As It Was After Congressional Legislation of the Home Rule Act

The Council's re-enactment of the 1947 Tax Act does not change the Court's finding that the Council shall not impose a tax on nonresident's personal income.

The U.S. District Court for the District of Columbia in *In re WPG, Inc.* has recognized that "[r]e-enactment of a law carries the same meaning as that contained in the prior law." 282 B.R at 69 (citing *Harvin v. U.S.*, 445 F.2d 675, 687-88 (D.C. Cir. 1971) (concurring opinion)). So the Council's Enactment Act of 1996 authenticated the 1947 Tax Act as codified in Title 47 of the District of Columbia Code, "excluding repealed laws, and including amendments." (Government's Reply at 4.) At the time of the re-enactment, Congress had already legislated for the District the 1947 Tax Act followed by the Home Rule Act. Thus, the Court must not give force only to a prior law that was re-enacted, but must also reconcile it with any later legislation if there were to be any

inconsistencies. Consequently, the Council's Enactment Act of 1996 authenticated not just the 1947 Tax Act as codified in Title 47 of the District of Columbia Code, but also any related empowerment and constriction on the Council with respect to the 1947 Tax Act found in the Home Rule Act. The Court doubts that the Government is suggesting that by authenticating the 1947 Tax Act, the Council would be deprived of its UB regulatory authority, and thus restored to Congress its exclusive authority to regulate UB tax that Congress clearly forewent in the Home Rule Act. This would take the purpose of the re-enactment beyond that of a technical amendment, maintenance or housekeeping that the Government contends. (Government's Reply at 1, 6.) Absent an explicit authority from the Congress, the Council's Enactment Act of 1996 can neither change how the UB tax was regulated on the day before the re-enactment nor on the day thereafter.

Indeed, the re-enactment of federal statute is not the equivalent of state action so that the re-enactment of the D.C. Revenue Act of 1949 did not alter the prior federal effect of the D.C. sales tax, which created an exception giving D.C. sales tax lien a priority over federal tax lien. In re WPG, Inc., supra, 282 B.R. at 69. Similarly here, the re-enactment of the 1947 Tax Act has not altered the federal effect of the Tax Act of 1947 and the Home Rule Act, whereby Congress created an exception giving the Council the UB regulatory authority with the restriction that the Council shall not tax the personal income of the nonresidents of the District. Therefore, without offending the precedential effect of In re WPG, Inc., the Court holds that the D.C. Reenactment Act of 1996 carried forward the prohibiting effect of Home Rule Act § 602(a)(5) on the

Council to impose a tax upon any UB net income to the extent of that net income is to be distributed to the nonresidents directly and personally.

In sum, the Court concludes that from the congressional legislated Income and Franchise Tax Act of 1947, Congress vested in the Council the UB regulatory authority, which is subject to the limitation that the Council shall not tax any personal income of the nonresidents of the District, and which the Council's Enactment Act of 1996 reaffirmed as a whole. And the personal income of a nonresident of the District includes the extent of the net income of an unincorporated business that is distributed to the nonresident personally.

Accordingly, Respondent's Motion for Summary Judgment is DENIED and Petitioners' Cross-Motion for Summary Judgment is GRANTED.

It is so ORDERED on this 8 day March, 2006.

Footnotes

[1]A calendar year begins on January 1 and ends on December 31.
[2]A fiscal year begins on October 1 and ends on September 30.
[3]Unless otherwise specified, all subsequent statutory citations reference the 2001 edition of the Code.

D.C. Code § 1-201.01 (2001):

> Short Title. This chapter may be cited as the "District of Columbia Home Rule Act".

D.C. Code § 1-201.02 (2001):

> Purposes.
>
> (a) Subject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by article I, § 8, of the Constitution, the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia; authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government; modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.
>
> (b) Congress further intends to implement certain recommendations of the Commission on the Organization of the Government of the District of Columbia and take certain other actions irrespective of whether the charter for greater self-government provided for in subchapter IV of this chapter is accepted or rejected by the registered qualified electors of the District of Columbia.

D.C. Code § 1-203.02 (2001):

> Legislative power. Except as provided in §§ 1-206.01 to 1-206.03, the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this chapter subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States.

D.C. Code § 1-204.04 (2001):

Powers of the Council.

(a) Subject to the limitations specified in §§ 1-206.01 to 1-206.04, the legislative power granted to the District by this chapter is vested in and shall be exercised by the Council in accordance with this chapter. In addition, except as otherwise provided in this chapter, all functions granted to or imposed upon, or vested in or transferred to the District of Columbia Council, as established by Reorganization Plan No. 3 of 1967, shall be carried out by the Council in accordance with the provisions of this chapter.

(b) The Council shall have authority to create, abolish, or organize any office, agency, department, or instrumentality of the government of the District and to define the powers, duties, and responsibilities of any such office, agency, department, or instrumentality.

(c) The Council shall adopt and publish rules of procedures which shall include provisions for adequate public notification of intended actions of the Council.

(d) Every act shall be published and codified upon becoming law as the Council may direct.

(e) An act passed by the Council shall be presented by the Chairman of the Council to the Mayor, who shall, within 10 calendar days (excluding Saturdays, Sundays, and holidays)

after the act is presented to him, either approve or disapprove such act. If the Mayor shall approve such act, he shall indicate the same by affixing his signature thereto, and such act shall become law subject to the provisions of § 1-206.02(c). If the Mayor shall disapprove such act, he shall, within 10 calendar days (excluding Saturdays, Sundays, and holidays) after it is presented to him, return such act to the Council setting forth in writing his reasons for such disapproval. If any act so passed shall not be returned to the Council by the Mayor within 10 calendar days after it shall have been presented to him, the Mayor shall be deemed to have approved it, and such act shall become law subject to the provisions of § 1-206.02(c) unless the Council by a recess of 10 days or more prevents its return, in which case it shall not become law. If, within 30 calendar days after an act has been timely returned by the Mayor to the Council with his disapproval, two-thirds of the members of the Council present and voting vote to reenact such act, the act so reenacted shall become law subject to the provisions of § 1-206.02(c).

(f) In the case of any budget act adopted by the Council pursuant to § 1- 204.46 and submitted to the Mayor in accordance with subsection (e) of this section, the Mayor shall have power to disapprove any items or provisions, or both, of such act and approve the remainder. In any case in which the Mayor so disapproves of any item or provision, he shall append to the act when he signs it a statement of the item or provision

which he disapproves, and shall, within such 10-day period, return a copy of the act and statement with his objections to the Council. If, within 30 calendar days after any such item or provision so disapproved has been timely returned by the Mayor to the Council, two-thirds of the members of the Council present and voting vote to reenact any such item or provision, such item or provision so reenacted shall be transmitted by the Chairman to the President of the United States. In any case in which the Mayor fails to timely return any such item or provision so disapproved to the Council, the Mayor shall be deemed to have approved such item or provision not returned, and such item or provision not returned shall be transmitted by the Chairman to the President of the United States. In the case of any budget act for a fiscal year which is a control year (as defined in § 47-393(4)), this subsection shall apply as if the reference in the second sentence to "ten-day period" were a reference to "five-day period" and the reference in the third sentence to "thirty calendar days" were a reference to "5 calendar days."

D.C. Code § 1-206.02 (2001):

Limitations on the Council.

(a) The Council shall have no authority to pass any act contrary to the provisions of this chapter except as specifically provided in this chapter, or to:

(1) Impose any tax on property of the United States or any of the several states;

(2) Lend the public credit for support of any private undertaking;

(3) Enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District;

(4) Enact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts);

(5) Impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District (the terms "individual" and "resident" to be understood for the purposes of this paragraph as they are defined in § 47-1801.04);

***

D.C. Code § 1-207.61 (2001):

> Construction.
>
> (a) To the extent that any provisions of this chapter are inconsistent with the provisions of any other laws, the provisions of this chapter shall prevail and shall be deemed to supersede the provisions of such laws.
>
> (b) No law or regulation which is in force on January 2, 1975, shall be deemed amended or repealed by this chapter except to the extent specifically provided herein or to the extent that such law or regulation is inconsistent with this chapter, but any such law or regulation may be amended or repealed by act or resolution as authorized in this chapter, or by Act of Congress, except that, notwithstanding the provisions of § 1-207.52, such authority to repeal shall not be construed as authorizing the Council to repeal or otherwise alter, by amendment or otherwise, any provision of subchapter III of Chapter 73 of Title 5, United States Code, in whole or in part.

D.C. Code § 47-1801.04 (2001):

> General definitions. For the purposes of this chapter and wherever appearing herein, unless otherwise required by the context the term:
>
> (1) "District" means the District of Columbia.
>
> ***
>
> (4) "Individual" means all natural persons (other than fiduciaries), whether married or unmarried.
>
> ***
>
> (17) "Resident" means every individual domiciled within the District at any time during the taxable year, and every other individual who maintains a place of abode within the District for an aggregate of 183 days or more during the taxable year, whether or not such other individual is domiciled in the District. The term "resident" shall not include any elective officer of the government of the United States or any employee on the staff of an elected official in the legislative branch of the government of the United States if such employee is a bona fide resident of the state of residence of such elected officer, or any officer of the executive branch of such government whose appointment to the office held by him was

by the President of the United States and subject to confirmation by the Senate of the United States and whose tenure of office is at the pleasure of the President of the United States, or any Justice of the Supreme Court of the United States, unless such officers or Justices are domiciled within the District at any time during the taxable year. In determining whether an individual is a "resident", such individual's absence from the District for temporary or transitory purposes shall not be regarded as changing his domicile or place of abode.

(18) "Nonresident" means every individual other than a resident.

***

D.C. Code § 47-1808.03 (2001):

Tax on unincorporated businesses--Levy and rates.

(a) Except as exempted under subchapter II of this chapter, for the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is levied:

(1) For 1 taxable year beginning after December 31, 1974, a tax at the rate of 12% upon the taxable income of every unincorporated business, whether domestic or foreign;

(2) For the taxable years beginning after December 31, 1975, a tax at the rate of 9% upon the taxable income of every unincorporated business, whether domestic or foreign, except that, effective October 1, 1984, the rate of tax shall be 10% upon the taxable income for any taxable period, except that for taxable years beginning after December 31, 1994, the rate of tax shall be 9.5%;

(3) For the taxable years beginning after December 31, 2002, a tax at the rate of 9.5% upon the taxable income of every unincorporated business, whether domestic or foreign.

(3A)(A) A surtax at the rate of 2.5% on

the tax *determined under* paragraph (2) or (3) of this subsection, as applicable.

(B) Subparagraph (A) of this paragraph shall apply for any tax period beginning after September 30, 1992.

(3B)(A) A surtax at the rate of 2.5%, separate from and in addition to, the surtax imposed by paragraph (3A) of this subsection, on the tax determined under paragraph (2) or (3) of this subsection, as applicable, for any tax period beginning after September 30, 1994.

(B) Subparagraph (A) of the paragraph shall apply for any tax period beginning after September 30, 1994.

(4) For the taxable years beginning after December 31, 2003, a tax at the rate of 9.975% upon the taxable income of every unincorporated business, whether domestic or foreign.

(b) The minimum tax payable under this section shall be $100.

D.C. Code § 47-1810.01 (2001):

Purpose of chapter.

(a) It is the purpose of this chapter to impose:

(1) An income tax upon the entire net income of every resident and every resident estate and trust; and

(2) A franchise tax upon every corporation, financial institution, and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District; provided, however, that, in the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this chapter or under Chapter 26 of this title, and, in the case of a corporation not engaged in carrying on any trade or business within the District, interest received by it from a corporation which is subject to taxation under this chapter or under Chapter 26 of this title shall not be considered as income from sources within the District for purposes of this chapter; and in the case of any corporation organized as a bank holding company under the provisions of the Bank Holding Company Act of 1956 and the Bank Holding Company Act Amendments of 1970, the amount received as dividends from a corporation which is subject to taxation under this chapter or under the provisions of § 47-2501, and in the case of any such bank holding company not engaged in carrying on any trade or business within the

District, interest received by it from a corporation which is subject to taxation under such sections, shall not be considered as income from sources within the District for purposes of this chapter. Provided further, that income derived from the sale of tangible personal property by a corporation, financial institution, or unincorporated business not carrying on or engaging in trade or business within the District as defined in §§ 47-1801.01 to 47-1801.04 shall not be considered as income from sources within the District for purposes of this chapter, with the exception of income from sale to the United States not excluded from gross income as provided in § 47-1803.02(a)(2)(I); provided, further, that dividends received from subsidiary corporations for whom the taxpayer provides services are deemed to be business income subject to apportionment.

(b) Notwithstanding the provisions of this section, all interest received and all dividends (except dividends of corporations subject to the District of Columbia franchise tax or interest and dividends attributable to any IBF time deposit or IBF loan) received by financial institutions shall be deemed to be business income.

UNITED STATES PUBLIC LAWS
93rd Congress - Second Session
Convening January 21, 1974

Copr. © West Group 1998. No Claim to Orig. U.S. Govt. Works

DATA SUPPLIED BY THE U.S. DEPARTMENT OF JUSTICE. (SEE SCOPE)
Additions and Deletions are not identified in this document.

PL 93-407 (HR 15842)
SEPTEMBER 3, 1974

An Act TO INCREASE COMPENSATION FOR DISTRICT OF COLUMBIA POLICEMEN, FIREMEN, AND TEACHERS; TO INCREASE ANNUITIES PAYABLE TO RETIRED TEACHERS IN THE DISTRICT OF COLUMBIA; TO ESTABLISH AN EQUITABLE TAX ON REAL PROPERTY IN THE DISTRICT OF COLUMBIA; TO PROVIDE FOR ADDITIONAL REVENUE FOR THE DISTRICT OF COLUMBIA; AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

***

PART 6--DELEGATION OF GENERAL TAXING

AUTHORITY; AMENDMENTS TO DISTRICT SALES TAX ACT AND MISCELLANEOUS

SEC. 471. IN ORDER TO PROVIDE FOR ADDITIONAL REVENUE TO MEET ADDITIONAL EXPENDITURES RESULTING FROM A COMPENSATION INCREASE ADOPTED FOR PERSONS PAID UNDER THE DISTRICT OF COLUMBIA TEACHERS' SALARY ACT OF 1955, "ANTE, P. 1042." POLICEMEN, AND FIREMEN, THE COUNCIL, IN ACCORDANCE WITH SECTION 406 OF REORGANIZATION PLAN NUMBERED 3 OF 1967, IS AUTHORIZED TO CHANGE THE RATE OF THE TAXES IMPOSED UNDER–,

(1) THE DISTRICT OF COLUMBIA INCOME AND FRANCHISE TAX ACT OF 1947, "61 STAT. 628, D.C. CODE 47--1551 NOTE."

(2) THE DISTRICT OF COLUMBIA SALES TAX ACT, "63 STAT. 112, D. C. CODE 47--2601 NOTE."

(3) THE DISTRICT OF COLUMBIA USE TAX ACT, D.C. CODE 47--2701."

(4) THE DISTRICT OF COLUMBIA CIGARETTE TAX ACT, "D.C. CODE 47--2810 NOTE."

(5) THE DISTRICT OF COLUMBIA ALCOHOLIC BEVERAGE CONTROL ACT, D.C. CODE 47--2801 NOTE."

(6) THE ACT OF APRIL 23, 1924 (RELATING TO MOTOR VEHICLE FUEL ACT, "48 STAT. 319, D.C.

CODE 25--101."

(7) TITLE V OF THE DISTRICT OF COLUMBIA REVENUE ACT OF 1937, AND "D.C. CODE 47--1901."

(8) ANY OTHER ACT OF CONGRESS IMPOSING A TAX SOLELY IN THE DISTRICT OF COLUMBIA.

SEC. 472. SECTION 471 SHALL TAKE EFFECT ON THE DATE OF ENACTMENT OF THIS ACT. "50 STAT. 673, D.C. CODE 47--401 ET SEQ."

SEC. 473. SECTION 114(A)(8) OF THE DISTRICT OF COLUMBIA SALES TAX ACT (D.C. CODE, SEC. 47--2601(A)(8) "D.C. CODE 47--504 NOTE, 63 STAT. 112." IS AMENDED TO READ AS FOLLOWS:

"(8) THE SALE OF OR CHARGES FOR ADMISSION TO PUBLIC EVENTS, EXCEPT LIVE PERFORMANCES OF BALLET, DANCE, OR CHORAL PERFORMANCES, CONCERTS (INSTRUMENTAL AND VOCAL), PLAYS (WITH AND WITHOUT MUSIC), OPERAS AND READINGS AND EXHIBITIONS OF PAINTINGS, SCULPTURE, PHOTOGRAPHY, GRAPHIC AND CRAFT ARTS, BUT INCLUDING MOVIES, CIRCUSES, BURLESQUE SHOWS, SPORTING EVENTS, AND PERFORMANCES OR EXHIBITIONS OF ANY OTHER TYPE OR NATURE: PROVIDED, THAT ANY CASUAL OR ISOLATED SALE OF OR CHARGE FOR ADMISSION MADE BY A SEMIPUBLIC

INSTITUTION NOT REGULARLY ENGAGED IN ASKING SUCH SALES OR CHARGES SHALL NOT BE CONSIDERED A RETAIL SALE OR SALE AT RETAIL."

SEC. 741. THE FOLLOWING ACT OR PARTS OF ACTS ARE REPEALED EFFECTIVE JUNE 30, 1975:

(A) TITLE XV OF THE DISTRICT OF COLUMBIA PUBLIC WORKS ACT OF 1954 (D.C. CODE, SEC. 47--501A.). "68 STAT. 119."

(B) THE FOURTH AND FIFTH PARAGRAPHS UNDER THE HEADING "GENERAL EXPENSES" OF THE ACT OF MARCH 3, 1881 (D.C. CODE, (D.C. CODE, SEC. 47--601). "21 STAT. 460, D.C. CODE 47--301.//

(C) THE FIFTH PARAGRAPH UNDER THE PARAGRAPH HEADED "MILITIA" OF THE ACT OF JULY 7, 1898 (D.C. CODE, SEC. 47--602).

(D) SECTION II OF THE ACT OF JUNE 25, 1938 (D.C. CODE, SEC. 47 - 603).

(E) THE FIRST PARAGRAPH OF SECTION 5 (D.C. CODE, SEC. 47--713), AND THE SECOND UNNUMBERED PARAGRAPH OF SECTION 6 (D.C. CODE, SEC. 47--605), OF JULY 1, 1902. "32 STAT. 616; 44 STAT. 833, D.C. CODE 47--713."

(F) THE FIRST SECTION, AND SECTIONS 2,3,4,6,7, AND 8 OF THE ACT OF AUGUST 14, 1894 (D.C. CODE, SECS. 47--604, 701, 702, 704, 707).

(G) THE FIRST FIVE SENTENCES, AND THE LAST TWO SENTENCES, OF SECTION 5(A) OF THE ACT OF AUGUST 17, 1937 (D.C. CODE, SECS., 47--708--47--709). "52 STAT. 372; 84 STAT. 580 D.C. CODE 47--2405."

(H) SECTION 5 OF THE ACT OF MARCH 3, 1883 (D.C. CODE, SEC., 47 - 703). "22 STAT. 569, D.C. CODE 47--621 NOTE."

SEC. 475. EXCEPT AS SPECIFICALLY PROVIDED IN THIS TITLE, NOTHING IN THIS TITLE, OR ANY AMENDMENTS MADE BY THIS ACT, SHALL BE CONSTRUED SO AS TO AFFECT THE AUTHORITY VESTED IN THE COMMISSIONER OF THE K DISTRICT OF COLUMBIA OR THE AUTHORITY VESTED IN THE DISTRICT OF COLUMBIA COUNCIL BY REORGANIZATION PLAN NUMBERED 3 OF 1967. "81 STAT. 948, 5 USC APP. II." THE PERFORMANCE OF ANY FUNCTION VESTED BY THIS TITLE IN THE COMMISSIONER OF THE DISTRICT OF COLUMBIA OR IN ANY OFFICE OR AGENCY UNDER HIS JURISDICTION AND CONTROL, OR IN THE DICTRICT OF COLUMBIA COUNCIL, MAY BE DELEGATED BY THE COMMISSIONER OR BY THE COUNCIL, AS THE CASE MAY BE, IN ACCORDANCE WITH THE PROVISIONS OF SUCH PLAN.

SEC. 476. (A) THE REPEAL OR AMENDMENT BY THIS TITLE OF ANY PROVISION OF LAW SHALL NOT AFFECT ANY ACT DONE OR ANY RIGHT ACCRUED OR ACCRUING UNDER SUCH

PROVISION OF LAW BEFORE THE EFFECTIVE DATE OF THIS TITLE OR ANY SUIT OR PROCEEDING HAD OR COMMENCED BEFORE THE EFFECTIVE DATE OF THIS TITLE, BUT ALL SUCH RIGHTS AND LIABILITIES UNDER SUCH LAW SHALL CONTINUE, AND MAY BE ENFORCED IN THE SAME MANNER AND TO THE SAME EXTENT, AS IF SUCH REPEAL OR AMENDMENT HAD NOT BEEN MADE. "D.C. CODE 47--621 NOTE."

(B) ALL OFFENSES COMMITTED, AND ALL PENALTIES INCURRED, PRIOR TO THE EFFECTIVE DATE OF THIS TITLE, UNDER ANY PROVISION OF LAW HEREBY REPEALED OR AMENDED, MAY BE PROSECUTED AND PUNISHED IN THE SAME MANNER AND WITH THE SAME EFFECT AS IF THIS TITLE HAD NOT BEEN ENACTED.

SEC. 477. EXCEPT AS SPECIFICALLY PROVIDED IN THIS ACT, OR IN OTHER PROVISIONS OF LAW APPLICABLE TO THE DISTRICT OF COLUMBIA, THE COUNCIL MAY BY REGULATION ESTABLISH PENALTIES FOR VIOLATIONS OF ANY PROVISION OF THIS TITLE, INCLUDING ANY REGULATION ISSUED PURSUANT TO THIS TITLE. SUCH PENALTIES MAY NOT EXCEED IMPRISONMENT FOR LONGER THAN ONE YEAR, OR A FINE NOT TO EXCEED $10,000, OR BOTH, FOR EACH OFFENSE. "D.C. CODE 47 - 661."

SEC. 478. EXCEPT AS SPECIFICALLY PROVIDED IN THIS TITLE, THE PROVISIONS

OF THIS TITLE SHALL TAKE EFFECT ON THE DATE OF ENACTMENT OF THIS TITLE, EXCEPT THAT PART 1 AND SUBPARTS A THROUGH G OF PART 2 SHALL APPLY BEGINNING WITH THE FISCAL YEAR BEGINNING JULY 1, 1975. "D.C. CODE 47--621 NOTE"

TITLE V--POWERS OF THE COUNCIL

SEC. 501. "D.C. CODE 47--621 NOTE."NOTWITHSTANDING ANY OTHER PROVISION OF LAW, OR ANY RULE OF LAW, NOTHING IN THIS ACT SHALL BE CONSTRUED AS LIMITING THE AUTHORITY OF THE COUNCIL OF THE DISTRICT COLUMBIA TO ENACT ANY ACT, RESOLUTION, OR REGULATION, AFTER JANUARY 2, 1975, PURSUANT TO THE DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT WITH RESPECT TO ANY MATTER COVERED BY THIS ACT. "87 STAT. 774, D.C. CODE 1--101 NOTE."

LEGISLATIVE HISTORY:
HOUSE REPORTS: NO. 93--1203 (COMM. ON THE DISTRICT OF COLUMBIA) AND NO. 93--1294 (COMM. OF CONFERENCE).
SENATE REPORTS: NO. 93--1077 (COMM. ON THE DISTRICT OF COLUMBIA) AND NO. 93--1101 (COMM. CONFERENCE).
CONGRESSIONAL RECORD, VOL. 120 (1974):
JULY 29, CONSIDERED AND PASSED HOUSE.
AUG. 8, CONSIDERED AND PASSED SENATE, AMENDED.

AUG. 16 SENATE AGREED TO CONFERENCE REPORT.
AUG. 20, HOUSE AGREED TO CONFERENCE REPORT.

Approved September 3, 1974.

PL 93-407, 1974 HR 15842

END OF DOCUMENT

[CHAPTER 258]

AN ACT

TO PROVIDE REVENUE FOR THE DISTRICT OF COLUMBIA, AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT THIS ACT, DIVIDED INTO ARTICLES, MAY BE CITED AS THE "DISTRICT OF COLUMBIA REVENUE ACT OF 1947", AND THAT ARTICLE I OF THIS ACT MAY BE CITED AS THE "DISTRICT OF COLUMBIA INCOME AND FRANCHISE TAX ACT OF 1947".

TABLE OF CONTENTS

ARTICLE I—INCOME AND FRANCHISE TAX ACT

TITLE I—REPEAL OF PRIOR INCOME TAX ACT AND APPLICABILITY OF THIS ARTIC IS; GENERAL DEFINITIONS

SEC. 1. REPEAL OF PRIOR INCOME TAX ACT AND RETENTION OF CERTAIN PROVISIONS THEREOF.
SEC. 2. APPLICABILITY OF THIS ARTICLE.
SEC. 3. RETURNS UNDER PRIOR INCOME TAX ACT AND RETURNS FOR FIRST TAXABLE YEAR TO WHICH THIS ARTICLE IS APPLICABLE.
SEC. 4. GENERAL DEFINITIONS.
(a) "DISTRICT"
(b) COMMISSIONERS"
(c) "ASSESSOR":
(d) "COLLECTOR";
(e) "PERSON":
(f) "INDIVIDUAL":
(g) "FIDUCIARY":
(h) "TRADE OR BUSINESS":
(i) "TAXPAYER":

(j) "FISCAL YEAR":
(k) "TAXABLE YEAR":
(l) "CAPITAL ASSETS":
(m) "DIVIDEND":
(n) "STOCK":
(o) "SHAREHOLDER":
(p) "INCLUDE", "INCLUDES", OR "INCLUDING":
(q) "DEFICIENCY":
(r) "CORPORATION":
(s) "RESIDENT":
(t) "NONRESIDENT":
(u) "DEPENDENT"

TITLE I—EXEMPT ORGANIZATIONS

TITLE III NET INCOME. GROSS INCOME AND EXCLUSIONS THEREFROM. AND DEDUCTIONS

SEC. 1. NET INCOME DEFINED.
SEC. 2. GROSS INCOME AND EXCLUSIONS THEREFROM.
SEC. 3. (A) INDUCTIONS ALLOWED.
(B) INDUCTIONS NET ALLOWED.

TITLE IV—ACCOUNTING PERIODS, INSTALLMENT SALES, AND INVENTORIES

SEC. 1. ACCOUNTING PERIODS.
SEC. 2. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.
SEC. 3. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN
SEC. 4. INSTALLMENT SALES.
SEC. 5. INVENTORIES.
SEC. 6. ASSESSOR MAY REJECT METHOD OR ACCOUNTING EMPLOYED BY TAXPAYER.

TITLE V—RETURNS

SEC. 1. (A) FORMS OF RETURNS.
(B) TAXPAYER TO MAKE RETURN WHETHER FORM

SENT OR NOT.
(C) INFORMATION RETURNS.
SEC. 2. REQUIREMENT—WHO MUST FITS.
(a) RESIDENTS AND NONRESIDENTS.
(b) FIDUCIARIES.
(c) JOINT FIDUCIARIES.
(d) IN CASE OF TAXPAYER UNABLE TO MAKE OWN RETURN.
(e) CORPORATIONS.
(f) UNINCORPORATED BUSINESSES.
(g) PARTNERSHIPS.
SEC. 3. (A) TIME AND PLACE FOR FILLING RETURNS.
(B) EXTENSION OF TIME FOR FILLING RETURNS.
SEC. 4. (A) SECRECY OF RETURNS.
(b) RECIPROCAL EXCHANGE OF INFORMATION WITH THE UNITED STATES AND THE SEVERAL STATES.
(c) PUBLICATION OF STATISTICS.
(d) INFORMATION WHICH MAY BE DISCLOSED.
(e) PENALTIES FOR VIOLATION OF SECRECY-OF-RETURNS PROVISION.
(f) I 'RESERVATION OF RETURNS.

TITLE VI—TAX ON RESIDENTS AND NONRESIDENTS

SEC. 1. DEFINITIONS.
SEC. 2. PERSONAL EXEMPTIONS AND CREDIT FOR DEPENDENTS.
SEC. 3 IMPOSITION AND RATES OF TAX.
SEC. 4. OPTIONAL METHOD OF COMPUTATION.
SEC. 5. CREDITS AGAINST TAX ALLOWED RESIDENTS.

TITLE VII—TAX ON CORPORATIONS

SEC. 1. "TAXABLE INCOME" DEFINED.

SEC. 2. IMPOSITION AND RATE OF TAX.

TITLE VIII—TAX ON UNINCORPORATED BUSINESSES

SEC. 1. DEFINITION OF "UNINCORPORATED BUSINESSES".
SEC. 2. "TAXABLE INCOME" DEFINED.
SEC. 3. IMPOSITION AND RATE OF TAX.
SEC. 4. EXCEPTION.
SEC. 5. BY WHOM TAXES PAYABLE.
SEC. 6 PARTNERS ONLY TAXABLE.

TITLE IX—TAX ON ESTATES AND TRUSTS

SEC. 1. RESIDENT AND NONRESIDENT ESTATES AND TRUSTS DEFINED.
SEC. 2. RESIDENCE OR SITUS OF FIDUCIARY NOT TO CONTROL.
SEC. 3. IMPOSITION OF TAX.
SEC. 4. COMPUTATION OF TAX.
SEC. 5. COMPUTATION OF NET INCOME OF ESTATES OR TRUSTS.
SEC. 6 IN CASE TAXABLE YEAR OF BENEFICIARY IS DIFFERENT FROM THAT OF ESTATE OR TRUST.
SEC. 7. REVOCABLE TRUSTS.
SEC. 8. INCOME FOR BENEFIT OF GRANTOR.
SEC. 9. DEFINITION OF "IN DISCRETION OF GRANTOR".
SEC. 10. EMPLOYEES' TRUSTS.

TITLE X—PURPOSE OF ACT AND ALLOCATION AND APPORTIONMENT

SEC. 1. PURPOSE OF ARTICLE.
SEC. 2. ALLOCATION AND APPORTIONMENT.
SEC. 3. ALLOCATION OF INCOME AND DEDUCTIONS BETWEEN ORGANIZATIONS. ETC.

SEC. 1. BASIS FOR DETERMINING GAIN OR LOSS.

SEC. 2. (A) COMPUTATION OF GAIN OR LOSS.
(B) AMOUNT REALIZED.
SEC. 3. EXCHANGE IN REORGANIZATIONS.
SEC. 4. BASIS FOR DIVIDENDS PAID IN PROPERTY.
SEC. 5. EXCEPTION TO APPLICABILITY OF SECTIONS 1 THROUGH 8.
SEC. 6. DEPRECIATION.

TITLE XII—ASSESSMENT AND COLLECTION; TIME OR PAYMENT

SEC. 1. DUTIES OF ASSESSOR.
SEC. 2. STATEMENTS AND SPECIAL RETURNS.
SEC. 3. EXANIMATION OF BOOKS AND WITNESSES.
SEC. 4. RETURN BY ASSESSOR.
SEC. 5. DETERMINATION AND ASSESSMENT OF DEFICIENCY.
SEC. 6. JEOPARDY ASSESSMENT.
(a) AUTHORITY FOR MAKING;
(b) BOND TO STAY COLLECTION.
SEC. 7. (A) TIME OF PAYMENT.
(B) EXTENSION OF TIME FOR PAYMENTS.
(C) VOLUNTARY ADVANCE PAYMENT.
SEC. 8. WITHHOLDING OF TAX AT SOURCE.
SEC. 9. TAX A PERSONAL DEBT.
SEC. 10. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.
(a) GENERAL RULE;
(b) FALSE RETURN;
(c) WAIVER;
(d) COLLECTION AFTER ASSESSMENT.
SEC. 11. REFUNDS.
SEC. 12. CLOSING AGREEMENTS.
SEC. 13. COMPROMISES.
(a) AUTHORITY TO MAKE;
(b) CONCEALMENT OF ASSETS;
(c) COMPROMISE OF PENALTIES AND INTEREST.

SEC. 14. DEFINITION OF "PERSON".
SEC. 15. PAYMENT TO COLLECTOR AND RECEIPTS.

TITLE XIII—PENALTIES AND INTEREST

SEC. 1. FAILURE TO FILE RETURN.
SEC. 2. INTEREST ON DEFICIENCIES.
SEC. 3. ADDITIONS TO TAX IN CASE OF DEFICIENCY.
(a) NEGLIGENCE;
(b) FRAUD.
SEC. 4. ADDITIONS TO TAX IN CASE OF NONPAYMENT.
(a) TAX SHOWN ON RETURN.
(1) GENERAL RULE.
(2) IF EXTENSION GRANTED.
(B) DEFICIENCY.
SEC. 5. TIME EXTENDED FOR PAYMENT OF TAX SHOWN ON RETURN.
SEC. 6. PENALTIES.
(a) WILLFUL VIOLATION;
(b) DEFINITION OF "PERSON".

TITLE XIV—LICENSES

SEC. 1. REQUIREMENT.
SEC. 2. DURATION.
SEC. 3. LICENSES TO BE POSTED.
SEC. 4. WHERE A CORPORATION OR UNINCORPORATED BUSINESS HAS NO OFFICE OR PLACE OF BUSINESS IN THE DISTRICT. AGENT OR EMPLOYEE SHALL CARRY CERTIFICATE OR LICENSE.
SEC. 5. RENEWAL.
SEC. 6. PENALTY FOR FAILURE TO OBTAIN LICENSE.

TITLE XV—APPEAL

SEC. 1. APPEAL TO THE BOARD OF TAX APPEALS FOR THE DISTRICT OF COLUMBIA.
SEC. 2. ELECTION OF REMEDY.

TITLE XVI—RULES AND REGULATIONS
PERSONAL PROPERTY

ARTICLE III—AMENDMENT TO MOTOR FUEL TAX ACT

ARTICLE IV—AMENDMENT TO MOTOR VEHICLE INSPECTION ACT

ARTICLE V—INCREASE IN WATER RENTS AND ASSESSMENTS FOR WATER MAINS

ARTICLE VI—FEDERAL PAYMENT

ARTICLE VII—REPARABILITY CLAUSE

ARTICLE I—INCOME AND FRANCHISE TAX ACT

TITLE I—REPEAL OF PRIOR INCOME TAX ACT AND APPLICABILITY OF THIS ARTICLE; GENERAL DEFINITIONS

SEC. 1. REPEAL OF PRIOR INCOME TAX ACT.–The District of Columbia. Income Tax Act as approved and enacted July 16, 1939, and as amended, is hereby repealed with respect to taxable years or portions thereof beginning on and after the I at day to January 1947 for all purposes, except the following purposes in connection with taxes due or accrued under said District or Columbia Income Tax Act:

(a) For the imposition of assessments and penalties, civil and criminal, for the violation of the violation of or failure to comply with any provisions of such Act and the regulations prescribed thereunder.

(b) For requiring the making, filing, and submission of returns and reports required by such Act;

(c) For the examination of all books, records, and other documents, and witnesses;

(d) For the assessment and collection of the taxes imposed by such Act, and the filing of liens therefore; and

(e) For the allowance of refunds of overpayments of any taxes assessed under the provisions of such Act.

Sec. 2. APPLICABILITY OF ARTICLE.—The provisions of this Article shall apply to the taxable year or part thereof beginning on the 1st day of January 1947 and to succeeding taxable years.

Sec. 3. RETURNS UNDER PRIOR INCOME TAX ACT AND RETURNS FOR FIRST TAXABLE YEAR TO WHICH THIS ARTICLE IS APPLICABLE. —If the taxable year of any person ends on the last day of any month other than December prior to the 1st day of January 1947, such person shall file his return for such taxable year under the provisions of the District of Columbia Income Tax Act as approved and enacted July 26, 1039, and as amended, and pay the taxes imposed by said Act on his income for such taxable year at the times specified therefore in said Act. Such taxpayer shall also file is return of income, received or accrued, according to his method of accounting, during the period between the last day of such taxable year and the 1st day of January 1947 under the provisions of the District of Columbia Income Tax Act as approved July 26, 1039, and as amended, and pay the taxes imposed by said Act on his income for such period at the times specified therefore in said Act. Such portion of such person's income as is received or accrued according to his method of accounting, during taxable years or parts thereof to which this article is applicable shall be reported and taxed under the provisions of this article: *Provided, however*, That any

person whose taxable year ends subsequent to the 1st day of January 1947 may irrevocably elect to file his return of his income for such entire taxable year and pay the taxes imposed thereon under the provisions of this article.

SEC. 4. GENERAL DEFINITIONS.—For the purposes of this article and wherever appearing herein, unless otherwise required by the context—

(a) The word "District" means the District of Columbia.

(b) The word "Commissioners" means the Commissioners of the District of Columbia or their duly authorized representative or representatives.

(c) The word "Assessor" means the Assessor of the District of Columbia or his duly authorized representative or representatives.

(d) The word "Collector" means the Collector of Taxes of the District of Columbia or his duly authorized representative or representatives.

(e) The word "person" means an individual (other than a fiduciary), a fiduciary, a partnership (other than an unincorporated business), an association, an unincorporated business, and a corporation.

(f) The word "individual" means all natural persons (other than fiduciaries), whether married or unmarried.

(g) The word "fiduciary" means a guardian, trustee, executor, committee, administrator, receiver, conservator, or any other person acting in any fiduciary capacity for any person.

(h) The words "trade or business" include the engaging in or carrying on of any trade, business, profession, vocation or calling or commercial activity in the District of Columbia; and include the performance of the functions of a public office.

(i) The word "taxpayer" means any person required

by this Article to pay a tax, file a return or report, or apply for a license.

(j) The words "fiscal year" mean an accounting period of twelve months ending on the last day of any month other than December.

(k) The words "taxable year" mean the calendar year or the fiscal year, upon the basis of which the net income of the taxpayer is computed under this Article; if no fiscal year has been established by the taxpayer, they mean the calendar year. The phrase "taxable year" includes, in the case of a return made for a fractional part of a calendar or fiscal year under the provisions of this Article or under regulations prescribed by the Commissioners, the period for which such return is made: Provided, however, That no taxpayer may change from a calendar year to a fiscal year or from a fiscal year to a calendar year within any taxable year without the written permission of the Assessor.

(l) The words "capital assets" mean any property, whether real or personal, tangible or intangible, held by the taxpayer for more than two years (whether or not connected with his trade or business), but do not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the end of the taxable year or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(m) The word "dividend" means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus). wherever earned by the corporation and whether made in cash or any or her property (other than stock of the same class in the corporation if the recipient of such stock dividend has

neither received not exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to during upon or after liquidation or dissolution of the corporation: *Provided however*, That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this article the recipient thereof include any dividend shall be the market value of such property at the time of such distribution: *And provided however.* That the word "dividend" shall not include any dividend paid by a mutual life insurance company to shareholders

(n) The word "stock" includes a share in any association, joint-stock company, or insurance company.

(o) The word "shareholder" includes a member in an association, joint-stock company, or insurance company.

(p) The words "include", "includes", or "including", when used in a definition contained in this article, shall not be deemed to exclude other things otherwise within the meaning of the word or words defined.

(q) The word "deficiency" as used in this Act with respect to any tax imposed by this article means—

(1) the amount or amounts by which the tax imposed by this article as determined by the Assessor exceeds the amount shown as the tax by the taxpayer upon his return; or

(2) the amount assessed as a tax by the Assessor if no return is filed by the taxpayer.

(r) The word "corporation" includes any trust, association, joint-stock company, or partnership which is classed or should be classed as a corporation for purposes of Federal income taxation.

(s) The word "resident" means every individual domiciled within the District on the last day of the

taxable year, and every other individual who maintains a place of abode within the District for more than seven months of the taxable year, whether domiciled in the District or not. In the case of any resident who is an elective or appointive officer or an employee of the Government of the United States, and who is domiciled outside the District during the whole of the taxable year, there shall be excluded from the gross income of such resident salaries or wages received from the Government of the United States for services rendered as such officer or employee, and income derived from sources without the District. For the purposes of this Act the domicile of such officer or employee for any taxable year shall be in the State which be expressly declares to be the State of his domicile: *Provided*, That he shall have had a domicile in such State under the laws of such State immediately prior to the beginning of the taxable year for which the tax is claimed. Such declaration must be made in writing, under oath to the Assessor and the time for filing such declaration shall expire sixty days after written demand to file an income-tax return shall have been received by such officer or employee. As used in this subsection the term "State" means the several States, Territories, and possessions of the United States, and the term "Government of the United States" includes any agency or instrumentality thereof, but does not include the government of be District of Colombia.

(t) The word "nonresident" means every individual other than a resident.

(u) The term "dependent" means any of the following persons over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer:

(1) A son or daughter of the taxpayer, or a

descendant of either.

(2) A stepson or stepdaughter of the taxpayer.

(3) A brother, sister, stepbrother, or stepsister of the taxpayer.

(4) The father or mother of the taxpayer, or an ancestor of either.

(5) A stepfather or stepmother of the taxpayer.

(6) A son or daughter of a brother or sister of the taxpayer.

(7) A brother or sister of the father or mother of the taxpayer.

A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer

The terms "brother" and "sister" include a brother or sister of the half-blood. For the purposes of determining whether any of the foregoing relationships exist, a legally adopted child of a person shall be considered a child of such person by blood. The term "dependent" does not include any individual who is a citizen or subject of a foreign country unless such individual is a resident of the United States or of a country contiguous to the United States.

TITLE II—EXEMPT ORGANIZATIONS

SEC. 1. The following organizations shall be exempt from taxation under this Article:

(a) Labor organizations.

(b) Fraternal beneficiary societies, orders, or associations, (1) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and (2) providing for the payment of life, sick, or accident benefits to the members of such society, order, or association, or their dependents.

(c) Cemetery companies owned and operated exclusively for the benefit of their members and which

are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private individual or shareholder.

(d) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary. Or educational purposes, or for the prevention of cruelty to children or animals, to a substantial extent within the District, no part of the net earnings of which inures to the benefit of any private individual or shareholder, and no tart of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.

(e) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private individual or shareholder.

(f) Civic leagues or organizations not organized of profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted principally to charitable, educational, or recreational purposes within the District.

(g) Banks, trust companies, building and loan associations, insurance companies, companies which guarantee the fidelity of any individual or individuals, such as bonding companies, and companies which furnish abstracts of title or which insure titles to real estate, all of which pay taxes on their gross earnings, premiums, or gross receipts under existing laws of the

District.

(h) Corporations organized for the exclusive purpose of holding title to property, collecting income there from, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this article.

(i) Corporations organized under Acts of Congress, if such corporations are instrumentalities of the United States and if, under such Acts, as amended and supplemented, such corporations are exempt from Federal income taxes.

(j) Voluntary employees' beneficiary associations providing for the payment of life, sick, or accident benefits to the members of such association or their dependents, if (1) no part of their net earnings inures (other than through such payments) to the benefit of any private individual or shareholder, and (2) 85 per centum or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses.

(k) Voluntary employees' beneficiary associations providing for the payment of life, sick, or accident benefits to the members of such association or their dependents or their designated beneficiaries, if (1) admission to membership in such association is limited to individuals who are officers or employees of the United States Government or the Government of the District of Columbia, and (2) no part of the net earnings of such association inures (other than through such payments) to the benefit of any private individual or shareholder

TITLE III—NET INCOME, GROSS INCOME AND EXCLUSIONS THEREFROM, AND DEDUCTIONS

SEC. 1. NET INCOME.—For the purposes of this article and wherever appearing herein, unless otherwise required by the context, the words "net income" mean the gross income of a taxpayer less the deductions allowed by this article.

SEC. 2. GROSS INCOME AND EXCLUSIONS THEREFROM.—(a) The words "gross income" include gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this article, or income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this article, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

(b) The words "gross income" shall not include the following:

(1) PROCEEDS OR LIFE-INSURANCE POLICIES.—The proceeds of life-insurance policies paid by reason of the death of the insured, whether in a single sum or otherwise (but if such amounts are held by the insurer under an agreement to pay interest thereon, the interest payments shall be included in gross income).

(2)ANNUITIES, AND SO FORTH.—(A) Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life-insurance or endowment contract, but if

such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year), then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this title in respect to such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life-insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under subsection (1) or this subsection. This subsection and subsection 2 (b) (1) of this title shall not apply with respect to so much of a

***

(d) INFORMATION WHICH MAY BE DISCLOSED.—Nothing contained in section 4 (a) of this title shall be construed to prohibit the Assessor, in his discretion, from divulging or making known any information contained in, or relating to, any report, application, license, or return required under the provisions of this article other than such information as may be contained therein relating to the amount of income or any particulars relating

thereto or the computation thereof.

(e) PENALTIES FOR VIOLATION OF THIS SECTION.—Any violation of the provisions of this section shall be a misdemeanor and shall be punishable by a fine not exceeding $1,000 or imprisonment for six months, or both, in the discretion of the court. All prosecutions under this section shall be brought in the Municipal Court of the District of Columbia on information by the Corporation Counsel of the District of Columbia or any of his assistants in the name of the District of Columbia.

(f) PRESERVATION OF RETURNS.—All reports, applications, and returns received by the Assessor under the provisions of this article shall be preserved for six years, and thereafter until the Assessor orders them to be destroyed.

TITLE VI—TAX ON RESIDENTS AND NONRESIDENTS

SEC. 1. DEFINITION.—For the purposes of this article, and unless otherwise required by the context, the words "taxable income" mean the entire net income of every resident, in excess of the personal exemptions and credits for dependents allowed by section 2. of this title and that portion of the entire net income of every nonresident which is subject to tax under title VIII of this article.

SEC. 2. PERSONAL EXEMPTIONS AND CREDIT FOR DEPENDENTS.—There shall be allowed to residents the following credits against net income:

(a) An exemption of $1,000 for the taxpayer.

(b) An exemption of $1,000 for the spouse of the

taxpayer (1) if a joint return is made by the taxpayer and his spouse, in which case the aggregate exemption of the spouses shall be $2,000, or (2) if a separate return is made by the taxpayer, and his spouse has no gross income for the calendar year in which the taxable year of the taxpayer begins and is not the dependent of another taxpayer.

(c) An exemption of $500 for the each dependent, as defined in this article, whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than $500, except that the exemption shall not be allowed in respect of a dependent who has made a joint return with his spouse for the taxable year beginning in such calendar year.

(d) If the status of a taxpayer changes during the taxable year with respect to his marital status the amount allowed under subsection (b) of this section shall be apportioned in accordance with the number of months before and after such change. For the purposes of this subsection, a fractional part of a month shall be disregarded unless it amounts to more than half a month, in which case it shall be considered as a month.

(e) Beginning with the first taxable year to which this article is applicable and in succeeding taxable years, the amounts allowed under subsections (a) and (b) of this section shall be prorated to the day of death in the final return of a decedent dying before the end of the taxable year, and as of the date of death the personal exemption is terminated and not extended over the remainder of the taxable year.

(f) In the case if a return made for a fractional part of a taxable year, the personal exemptions and credits for dependents shall be reduced, respectively, to amounts which bear the same ratio to the full credits provided as the number of months in the period for

which the return is made bear to twelve months.

SEC. 3. IMPOSITION AND RATES OF TAX.—There is hereby annually levied and imposed for each taxable year upon the taxable income of every resident a tax at the following rates:

One per centum on the first $5,000 of taxable income.

One and one-half per centum on the next $5,000 of taxable income.

Two per centum on the next $5,000 of taxable income.

Two and one-half per centum on the next $5,000 of taxable income.

Three per centum on the taxable income in excess of $20,000.

SEC. 4. (a) OPTIONAL METHOD OF COMPUTATION.—In lien of the method of computation prescribed by section 3 of this title, a resident reporting on a cash basis for any full calendar year who does not claim credit for taxes paid by him to any State or Territory of the United States or political subdivision thereof under the provisions of section 5 of this title on the whole or any part of his income for such calendar year and, if his gross income for such calendar year is $5,ooo or less, and is derived solely from salaries, wages, dividends, and interest, may elect to pay the tax as shown in the following table

[Printers Note: See end of appendix]

(b) In applying the above schedule, to determine the tax of taxpayer with one or more dependents, there shall be subtracted from his gross income beginning with the first taxable year to which this article is applicable and succeeding taxable years. $500 for each

dependent as defined in this article.

(c) In applying the shove schedule, to determine whether the taxpayer is entitled to the personal exemption of $1,000 or $2,000, his status during the greater portion of the taxable year, as defined in this article, shall control

(d) An individual not living with husband or wife during the greater portion of the taxable year for the purposes of this article, shall be considered as a single person.

(e) The election given by this section as to the computation of tax due shall be considered to have been made if the taxpayer files the return prescribed for such computation and such election shall be final and irrevocable.

(f) If the taxpayer for any taxable year has filed a return computing his tax without regard to this section, he may not thereafter elect for such year to compute his tax under this section.

(g) This section shall not uppity to any fiduciary or to any married resident living with husband or wife at any time during the taxable year whose spouse files a return and computes the tax without regard to this section.

(h) If a husband and wife living together file separate returns, each shall be treated as a single person for the purposes of this section.

SEC. 5. CREDIT AGAINST TAX ALLOWED RESIDENTS.—The amount of tax payable under this title by an individual who, although a resident of the District of Columbia as defined in this article, was nevertheless a bona fide domiciliary of any State or Territory of the United States or political subdivision thereof during the taxable year shall be reduced by the amount required to be paid by such individual as

income or intangible personal property taxes, or both, for such taxable year to the State, Territory, or political subdivision thereof of which he was a domiciliary. The Assessor may require proof, satisfactory to him of the payment of such income or intangible personal property taxes: *Provided however.* That the credit provided for by this section shall not be allowed against any tax imposed under title VIII of this article.

TITLE VII—TAX ON CORPORATIONS

SEC. 1. TAXABLE INCOME DEFINED.—For the purposes of this title, and unless otherwise required by the context, the words "taxable income" mean the amount of net income derived from sources within the District within the meaning of title X of this article.

SEC. 2. IMPOSITION AND RARE OF TAX.—For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 per centum upon the taxable income of every corporation, whether domestic or foreign (except those expressly exempt under title II of this article).

TITLE VIII—TAX UNINCORPORATED BUSINESSES

SEC. 1. DEFINITION OF UNINCORPORATED BUSINESS.—For the purposes of this article (not alone of this title) and unless otherwise required by the contest the words "unincorporated business" mean any trade or basinets conducted or engaged in by any individual, whether resident or nonresident statutory or common-law trust, estate, partnership, or limited or

special partnership society, association, executor, administrator, receiver trustee liquidator, conservator, committer assigner or by any other entity or fiduciary, other than a trade or business conducted or engaged in by any corporation; and include any trade or business which if conducted or engaged in by a corporation would be taxable under title VII of this article. The words "unincorporated business" do not include any trade or business which by how, customs, or ethics cannot be incorporated or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income-producing factor.

SEC. 2 TAXABLE INCOME DEFINED.—For the purposes of this title, and unless otherwise require by the context, the words "taxable income" mean the amount of net income derived from sources within the District within the meaning of title X of this article in excess of the exemption granted by section 4 of this title.

SEC. 3. IMPOSITION AND RATE OF TAX.—For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 per centum upon the taxable income of every unincorporated business, whether domestic or foreign (except those expressly exempt under title II of this article).

SEC. 4. EXEMPTION.—Before computing the tax upon the taxable income of an unincorporated business, there shall be deducted there-from an exemption of $10,000, except that where the period covered by a

return is less than a year, or where a return shows that an unincorporated business has been carried on for less than twelve months, such exemption shall be prorated on a daily basis: *Provided, however.* That any amount exempted under this section from the tax imposed by section 3 of this title shall be reported and included in the gross income of that person or those persons entitled to a share therein in proportion to the share to which each person is entitled, and shall be reported in the return of each of such persons for his taxable year in which is ended the taxable year of the unincorporated business.

SEC. 5. BY WHOM PAYABLE.—The taxes imposed by section 3 of this title shall be payable by the person or persons, jointly and severally, conducting the unincorporated business. The taxes imposed under this title may be assessed in the name of the unincorporated business or in the name or names of the person or persons liable for the payment of such taxes, or both.

SEC. 6. PARTNERS ONLY TAXABLE.—Individuals carrying on any trade or business in partnership in the District, other than an unincorporated business, shall be liable for income tax only in their individual capacities. The tax on all such income shall be assessed against the individual partners under title VI of this article. There shall be included in computing the net income of each partner his distributive share, whether distributed or not of the net income of the partnership for the taxable year: or if his net income for such taxable years is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the

basis of which the partner's net income is computed.

TITLE IX—TAX ON ESTATES AND TRUSTS

SEC. 1. RESIDENT AND NONRESIDENT ESTATES AND TRUSTS.—For the purposes of this title, estates and trusts are (a) resident estates or trusts, or (b) nonresident estates or trusts. If the decedent was at the time of his death domiciled within the District, his estate is a resident estate, and any trust created by his will is a resident trust. If the decedent was not at the time of his death domiciled within the District, his estate is a nonresident estate, and any trust created by his will is a nonresident trust. If the creator of a trust was at the time the trust was created domiciled within the District or if the trust consists of property of a person domiciled within the District, the trust is a resident trust. If the creator of the trust was not at the time the trust was created domiciled within the District, of the trust for which the trust is not exempt under subsection (a) of this section shall be included in the gross income of an employee for the taxable year in which the contribution is made to the trust in the ease of an employee whose beneficial interest in such contribution is nonforfeitable at the time the contribution is made.

TITLE X—PURPOSE OF ARTICLE AND ALLOCATION AND APPORTIONMENT

SEC. 1. PURPOSE OF ARTICLE. —It is the purpose of this article to impose (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the

privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District: Provided, however, That, in the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this article, and, in the case of a corporation not engaged in carrying on any trade or business within the District, interest received by it from a corporation which is subject to taxation under this article shall not be considered as income from sources within the District for the purposes of this article. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as in derived from sources within the District.

SEC. 2. ALLOCATION AND APPORTIONMENT.—The entire net income of any corporation or unincorporated business, derived from any trade or business carried on or engaged in wholly within the District shall, for the purposes of this article, be deemed to be from sources within the District, and shall, along with other income from sources within the District, be allocated to the District. If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, the net income derived there-from shall, for the purposes of this article, be deemed to be income from sources within and without the District. Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. The

Assessor is authorized to employ any formula or formulas provided in any regulation or regulations prescribed by the Commissioners under this article which, in his opinion, should be applied in order to properly determine the net income of any corporation or unincorporated business subject to tax under this article.

SEC. 3. ALIIS OF TSCE AND DEDUCTIONS BETWEEN ORGANIZATIONS. AND SO FORM—In any of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the District and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Assessor is authorized to distribute, apportion, or allocate gross income or deductions between or among such organizations, trades, or businesses, whenever in his opinion such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses. The provisions of this section shall apply, but shall not be limited in application to any case of a common carrier by railroad subject to the Interstate Commerce Act and jointly owned or controlled directly or indirectly by two or more common curriers by railroad subject to said Act

****

Gross Income less allowance for dependents		Personal exemption status		Gross Income less allowance for dependents		Personal exemption status	
Over	But not over	$1,000	$2,000	Over	But not over	$1,000	$2,000
	Tot	Tot				Tot	Tot
0.00	$1.150	0.00	0	$3.050	$3.100	$17.50	$7.50
1.15	1.200	0.50	0	3.100	3.150	18.00	8.00
1.20	1.250	1.00	0	3.150	3.200	18.50	8.50
1.25	1.300	1.50	0	3.200	3.250	19.00	9.00
1.30	1.350	2.00	0	3.250	3.300	19.50	9.50
1.35	1.400	2.50	0	3.300	3.350	20.00	10.00
1.40	1.450	3.00	0	3.350	3.400	20.50	10.50
1.45	1.500	3.50	0	3.400	3.450	21.00	11.00
1.50	1.550	3.50	0	3.450	3.500	21.50	11.50
1.55	1.600	4.00	0	3.500	3.5050	21.50	11.50
1.60	1.650	4.50	0	3.550	3.600	22.00	12.00

1.65	1.700	5.00	0	3.600	3.650	22.50	12.50
1.70	1.750	5.50	0	3.650	3.700	23.00	13.00
1.75	1.800	6.00	0	3.700	3.750	23.50	13.50
1.80	1.850	6.50	0	3.750	3.800	24.00	14.00
1.85	1.900	7.00	0	3.800	3.850	24.50	14.50
1.90	1.950	7.50	0	3.850	3.900	25.00	15.00
1.95	2.000	8.00	0	3.900	3.950	25.50	15.50
2.00	2.050	8.00	0	3.950	4.000	26.00	16.00
2.05	2.100	8.50	0	4.000	4.050	26.00	16.00
2.10	2.150	9.00	0	4.050	4.100	26.50	16.50
2.15	2.200	9.50	0	4.100	4.150	27.00	17.00
2.20	2.250	10.00	0	4.150	4.200	27.50	17.50
2.25	2.300	10.50	30.60	4.200	4.250	28.00	18.00
2.30	2.350	11.00	1.00	4.250	4.300	28.50	18.50
2.35	2.400	11.50	1.50	4.300	4.350	29.00	19.00
2.40	2.450	12.00	2.00	4.350	4.400	29.50	19.50
2.45	2.500	12.50	2.50	4.400	4.450	30.00	20.00
2.50	2.505	12.50	2.50	4.450	4.500	30.50	20.50
2.55	2.600	13.00	3.00	4.500	4.550	30.50	20.50

2.60	2.650	13.50	3.50	4.550	4.600	31.00	21.00
2.65	2.700	14.00	4.00	4.600	4.650	31.50	21.50
2.70	2.750	14.50	4.50	4.650	4.700	32.00	22.00
2.75	2.800	15.00	5.00	4.700	4.750	32.50	22.50
2.80	2.850	15.50	5.50	4.750	4.800	33.00	23.00
2.85	2.900	16.00	6.00	4.800	4.850	33.50	23.50
2.90	2.950	16.50	6.50	4.850	4.900	34.00	24.00
2.95	3.000	17.00	7.00	4.900	4.950	34.50	24.50
3.00	3.050	17.50	7.50	4.950	5.000	35.00	25.00

1

FILED
JAN 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-719

IN THE

Supreme Court of the United States

KENNETH BENDER, ET AL.,
Petitioners,

v.

DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION BY THE DISTRICT OF COLUMBIA

LINDA SINGER
Acting Attorney General for the District of Columbia

TODD S. KIM
Solicitor General

EDWARD E. SCHWAB
Deputy Solicitor General

*JAMES C. MCKAY, JR.
Senior Assistant Attorney General
Office of the Attorney General for the District of Columbia
Office of the Solicitor General
441 Fourth Street, N.W., 6th floor South
Washington, D.C. 20001
Telephone: (202) 724-5690
Attorneys for Respondent

**Counsel of Record*

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

COUNTER-STATEMENT OF THE CASE 2

A. Legislative Scheme 2

1. District of Columbia Income and Franchise Act of 1947 2

2. Home Rule Act 4

3. District of Columbia Real Property Tax Revision Act of 1974 6

B. Facts 8

REASONS FOR DENYING THE PETITION 11

A. Because the decision of the D.C. Court of Appeals involved an issue of local law only and was plainly correct, this Court's review is not warranted. 11

B. The difference in interpretation of District of Columbia law by the D.C. Court of Appeals and the Supreme Court of Virginia does not create a conflict requiring resolution by this Court. 16

TABLE OF CONTENTS (continued)

Page

C. The argument that the exemption limited to professional and personal-services businesses violates the Equal Protection Clause was not raised below and is without merit because it is rational to treat income derived from personal labors of individuals differently from income derived from business operations.. 19

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Bishop v. District of Columbia
401 A.2d 955 (D.C. 1978),
aff'd, 411 A.2d 997 (D.C.) (en banc)
cert. denied, 446 U.S. 966 (1980) ... 8, 9, 15, 16, 17, 18

Bolling v. Sharpe
347 U.S. 497 (1954) 19

Bullington v. Missouri
451 U.S. 430 (1981) 16

Citizens Association of Georgetown v.
Zoning Commission of the District of Columbia
392 A.2d 1027 (D.C. 1978) (en banc) 13

TABLE OF AUTHORITIES (continued)

Page

Convention Center Referendum Committee v. District of Columbia Bd. of Elections and Ethics
441 A.2d 871 (D.C. 1980), *aff'd on rehearing*,
441 A.2d 889 (D.C. 1981) (en banc) 13

District of Columbia Court of Appeals v. Feldman
460 U.S. 462 (1983) 19

District of Columbia v. Califano
647 A.2d 761 (D.C. 1994) 15, 16

District of Columbia v. John R. Thompson, Inc.
346 U.S. 100 (1953) 12

Elmendorf v. Taylor
23 U.S. 152 (1825) 17

Fisher v. United States
328 U.S. 463 (1946) 11

Griffin v. United States
336 U.S. 704 (1949) 11

Hendrick v. District of Columbia
183 F.2d 1002 (D.C. Cir. 1950) 21

Key v. Doyle
434 U.S. 59 (1977) 16

King v. Forst
391 S.E.2d 60 (Va. 1990) 17

TABLE OF AUTHORITIES (continued)

Page

Louisville Gas & Electric Co. v. Coleman
277 U.S. 32 (1928) 20

Mathy v. Commonwealth of Virginia, Dep't of Taxation
483 S.E. 2d 802 (Va.)
cert. denied, 522 U.S. 967 (1997) 16, 17

Metropolitan Life Ins. Co. v. Ward
470 U.S. 869 (1985) 20

Monge v. California
524 U.S. 721 (1998) 18

Neild v. District of Columbia
110 F.2d 246 (D.C. Cir. 1940) 12

Pernell v. Southall Realty
416 U.S. 363 (1974) 11

PUD No. 1 of Jefferson County v. Washington Dept. of Ecology
511 U.S. 700 (1994) 18

R.A.V. v. City of St. Paul, Minnesota
505 U.S. 377 (1992) 17

Roach v. Comptroller of the Treasury
610 A.2d 754 (Md. 1992) 17

United States v. Maryland Savings-Share Ins. Corp.
400 U.S. 4 (1970) 20

TABLE OF AUTHORITIES (continued)

Page

United States v. Ptasynski, 462 U.S. 74 (1983) 20

CONSTITUTIONAL PROVISIONS

U.S. CONST. ART. I, § 8, cl. 17 ..... 5, 12

FIFTH AMENDMENT 19

FOURTEENTH AMENDMENT 19, 20

STATUTES

D.C. Code § 1-201.01 *et seq.* (2006) 4

D.C. Code § 1-201.02(a) (2006) 4

D.C. Code § 1-203.02 (2006) 5

D.C. Code § 1-204.04(a) (2006) 4, 5, 7

D.C. Code § 1-204.12 (2006) 13

D.C. Code § 1-204.22 (2006) 5

D.C. Code § 1-204.24a(a), (c)(4) (2006) 14

D.C. Code § 1-206.02(a)(5) (2006) 6

D.C. Code § 1-207.17(b) (2006) 6

TABLE OF AUTHORITIES (continued)

Page

D.C. Code § 47-504(1) (2005) 7, 9, 14

D.C. Code § 47-1580a (1967) 4

D.C. Code § 47-1586g (1967) 4

D.C. Code § 47-1595 (1967) 4

D.C. Code § 47-1801.01 *et seq.* (2005) 2

D.C. Code § 47-1806.01 (2001) 10

D.C. Code § 47-1807.02 (2005) 3

D.C. Code § 47-1807.02(a)(4) (2005) 7

D.C. Code § 47-1807.02(b) (2005) 7

D.C. Code § 47-1808.01 (2005) 3, 12

D.C. Code § 47-1808.01(1) (2005) 21

D.C. Code § 47-1808.03(a)(4) (2005) 7

D.C. Code § 47-1808.03(b) (2005) 7

D.C. Code § 47-1808.05 (2001) 10

D.C. Code § 47-1810.01(a) (2005) 2

D.C. Code § 47-3310(b) (2005) 8

TABLE OF AUTHORITIES (continued)

Page

District of Columbia Court Reform and Criminal Procedure Act of 1970
PUB. L. NO. 91-358, 84 Stat. 475 (1970) 11

District of Columbia Income and Franchise Act of 1947
PUB. L. NO. 80-195, Art. I, 61 Stat. 328 (1947)
D.C. Code § 47-1801.01 *et seq.* (2005) ..... *passim*

District of Columbia Real Property Tax Revision Act of 1974, PUB. L. NO. 93-407, title IV, 88 Stat. 1036 (1974) 6, 7, 9, 14

§ 471(1) 7, 9, 15

§ 501 ..... 7, 9, 14

District of Columbia Revenue Act of 1947
PUB. L. NO. 80-195, 61 Stat. 328 (1947) 2

District of Columbia Self-Government and Governmental Reorganization Act
PUB. L. NO. 93-198, 87 Stat. 774 (1973),
D.C. Code § 1-201.01 *et seq.* (2006) ..... *passim*

§ 102(a) 5

§ 302 5

§ 404(a) 4, 5, 7, 8

§ 412 14

TABLE OF AUTHORITIES (continued)

Page

§ 422 5

§ 431 5

§ 601 ..... 6, 13

§ 602(a) 13

§ 602(a)(5) 6, 8, 13, 14

§ 717(b) 6, 9, 13

Organic Act of 1878, the Act of June 11, 1878
20 Stat. 102, ch.180, D.C. Code vol. 1 at 104 (2001) ... 4

28 U.S.C. § 41 (2000) 1

28 U.S.C. § 1254(1) (2000) 1

28 U.S.C. § 1257 (2000) 1

28 U.S.C. § 1257(1) (1982) 15

28 U.S.C. § 1257(b) (2000) 2

OTHER

9 D.C. MUN. REGS. § 104.1 (1998) 12

REORGANIZATION PLAN NO. 3 OF 1967
81 Stat. 948, D.C. Code vol. 1 at 125 (2001) 4, 6, 7

TABLE OF AUTHORITIES (continued)

Page

R. STERN, E. GRESSMAN, S. SHAPIRO, K. GELLER
SUPREME COURT PRACTICE (2002) 2

SUPREME COURT RULE 10 19

SUPREME COURT RULE 10(b) 16, 17

No. 06-719

IN THE

Supreme Court of the United States

KENNETH BENDER, ET AL.,
Petitioners,

V.

DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION BY THE DISTRICT OF COLUMBIA

OPINION BELOW

The opinion of the D.C. Court of Appeals, Pet. App. at 1a-14a,[1] is reported at 906 A.2d 277 (D.C. 2006).

JURISDICTION

Contrary to petitioners' assertion, this Court does not have jurisdiction under 28 U.S.C. § 1254(1) (2000). That provision applies only to decisions of the federal courts of appeals as defined by 28 U.S.C. § 41 (2000). The basis for this Court's jurisdiction over decisions of the D.C. Court of Appeals is 28 U.S.C. § 1257 (2000), which defines that court as the "highest

[1] "Pet. App." refers to the Appendix to the Petition.

court of a State." 28 U.S.C. § 1257(b) (2000). *See* R. STERN, E. GRESSMAN, S. SHAPIRO, K. GELLER, SUPREME COURT PRACTICE §§ 2.2, 2.13 (2002).

COUNTER-STATEMENT OF THE CASE

A. Legislative Scheme

1. District of Columbia Income and Franchise Act of 1947

Shortly after the close of World War II, Congress enacted the District of Columbia Income and Franchise Act of 1947, Article I of the District of Columbia Revenue Act of 1947, PUB. L. NO. 80-195, 61 Stat. 328 (1947); D.C. Code § 47-1801.01 *et seq.* (2005) (the "1947 Tax Act"). The purpose of the Act is stated as follows:

> (a) It is the purpose of this Act to impose:
>
> (1) An income tax upon the entire net income of every resident and every resident estate and trust; and
>
> (2) A franchise tax upon every corporation, financial institution, and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District . . . .

Id., Title X, § 1(a), 61 Stat. 349; D.C. Code § 47-1810.01(a) (2005).

The term "unincorporated business" is broadly defined as:

> . . . any trade or business, conducted or

> *nonresident*, statutory or common-law trust, estate, partnership, or limited or special partnership, society, association, executor, administrator, receiver, trustee, liquidator, conservator, committee assignee, or by any other entity or fiduciary, other than a trade or business conducted or engaged in by any corporation; and include[s] any trade or business which if conducted or engaged in by a corporation would be taxable under title VII of this article.

Id., Title VIII, § 1, 61 Stat. 345, D.C. Code § 47-1808.01 (2005) (emphasis added). However, unincorporated professional and personal-services businesses are exempted from the tax:

> The term "unincorporated business" does not include:
>
> (1) A trade or a business which by law, customs, or ethics cannot be incorporated;
>
> (2) A trade, a business, or a profession which can be incorporated only under Chapter 4 of Title 29 [Professional Corporations];
>
> (3) A trade or business in which more than 80% of the gross income is derived from the personal services actually rendered by the individuals or the members of the partnership or other entity in the conducting or the carrying on of a trade or a business and in which capital is not a material income-producing factor;
>
> . . . .

Id. An identical franchise tax is imposed on corporations, domestic and foreign, doing business in the District. *Id.*, Title VII, 61 Stat. 345; D.C. Code § 47-1807.02 (2005).

The 1947 Tax Act delegated to the Commissioners[2] the authority to prescribe rules (1) to determine formulas for allocation and apportionment of franchise taxes for multistate businesses, (2) concerning withholding of taxes, and (3) "as may be necessary and proper for [the Act's] enforcement and efficient administration." *See* D.C. Code §§ 47-1580a, 47-1586g, 47-1595 (1967).[3]

2. Home Rule Act

On December 24, 1973, Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act, PUB. L. NO. 93-198, 87 Stat. 774 (1973); D.C. Code § 1-201.01 *et seq.* (2006) (the "Home Rule Act"), most of which took effect on January 2, 1975, after ratification by the District voters. The primary purpose of the Act was, "to the greatest extent possible, consistent with the constitutional mandate, [to] relieve Congress of the burden of legislating upon essentially local District matters." *Id.*, § 102(a); D.C. Code § 1-201.02(a) (2006). Thus, except for specific limitations, the Act provides

---

[2]The three-member Board of Commissioners of the District of Columbia was established by the Organic Act of 1878, the Act of June 11, 1878, 20 Stat. 102, ch.180, D.C. Code vol. 1 at 104 (2001).

[3]In 1967, President Johnson promulgated Reorganization Plan No. 3 of 1967, 81 Stat. 948, D.C. Code vol. 1 at 125 (2001), which apportioned the Commissioners' functions between a Mayor-Commissioner and the District of Columbia Council, all appointed by the President. The functions transferred to the former Council (described as "quasi-legislative") included these three rulemaking functions pertaining to the 1947 Tax Act. *See* REORGANIZATION PLAN NO. 3 OF 1967, § 402(371), (372), (373), D.C. Code vol. 1 at 153 (2001). In 1975, these functions were transferred to the present, elected Council of the District of Columbia by § 404(a) of the Home Rule Act, D.C. Code § 1-204.04(a) (2006). *See* p. 4, *infra*.

that "the legislative power of the District shall extend to all rightful subjects of legislation within the District . . . ." *Id.*, § 302; D.C. Code § 1-203.02 (2006).

The Act establishes a traditional tripartite form of government, vesting the legislative power of the District in the Council of the District of Columbia, the executive power in the Mayor, and the judicial power in the District of Columbia Courts. *Id.*, §§ 404(a), 422, 431; D.C. Code §§ 1-204.04(a), 1-204.22, 1-204.31 (2006). The second sentence of § 404(a) also transfers to the newly created Council the quasi-legislative functions delegated by Congress to the Commissioners, which had been transferred to the former, presidentially appointed District of Columbia Council established by Reorganization Plan No. 3 of 1967.

The Act retains Congress's ultimate legislative authority over the District under Article I, § 8, clause 17 of the United States Constitution:

> Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.

Id., § 601; D.C. Code § 1-206.01 (2006). In addition, the Act provides certain specific limitations on the Council's legislative authority, including the following:

> (a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to
>
> . . .
>
> (5) impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District . . . .

Id., § 602(a)(5); D.C. Code § 1-206.02(a)(5) (2006).

To ensure continuity, a savings clause preserves the effectiveness of the numerous existing Acts of Congress applicable exclusively to the District:

> No law or regulation which is in force on the effective date of title IV of this Act [January 2, 1975] shall be deemed amended or repealed by this Act except to the extent specifically provided herein or to the extent that such law or regulation is inconsistent with this Act, but any such law or regulation may be amended or repealed by act or resolution as authorized in this Act, or by Act of Congress . . .

Id., § 717(b); D.C. Code § 1-207.17(b) (2006).

3. District of Columbia Real Property Tax Revision Act of 1974

On September 3, 1974, nine months after the Home Rule Act was enacted but before the elected Mayor and Council took office on January 2, 1975, Congress enacted the District of Columbia Real Property Tax Revision Act of 1974, PUB. L. NO. 93-407, title IV, 88 Stat. 1036 (1974). That Act, which increased

the compensation of teachers, police, and firefighters, provides that:

> . . . the Council, in accordance with § 406 of Reorganization Plan No. 3 of 1967,[4] is authorized to change the rate of the taxes imposed under:
>
> (1) the District of Columbia Income and Franchise Tax of 1947 . . . .

Id., § 471(1), 88 Stat. 1064; D.C. Code § 47-504(1) (2005).[5]

Section 501 of the Act makes it clear that it is not intended to limit the authority of the Council under the Home Rule Act:

> Notwithstanding any other provision of law, or any rule of law, nothing in this Act shall be construed as limiting the authority of the Council of the District of Columbia to enact any act, resolution or regulation, after January 2, 1975, pursuant to the District of Columbia Self-Government and Governmental

---

[4]Under § 406 of Reorganization Plan No. 3, D.C. Code vol. 1 at 158 (2001), the former Council's actions were subject to approval by the appointed Mayor-Commissioner.

[5]In accordance with § 404(a) of the Home Rule Act, D.C. Code § 1-204.04(a) (2006) (second sentence), the authority to change the rates for taxes imposed by Congress under the 1947 Tax Act was transferred to the elected Council of the District of Columbia on January 2, 1975. Pursuant to this authority, the Council has changed the franchise tax rate for unincorporated businesses, as well as corporations, so that the rate is currently 9.975 percent. D.C. Code §§ 47-1807.02(a)(4), 47-1808.03(a)(4) (2005). There is a minimum tax for both of $100. D.C. Code §§ 47-1807.02(b), 47-1808.03(b) (2005).

> Reorganization Act with respect to any matter covered by this Act.

88 Stat. 1066.

B. Facts

Petitioners (the "Benders") are residents of Montana, Florida, and Maryland who have ownership interests in four unincorporated businesses engaged in commercial real estate rental in the District. These businesses – not the Benders themselves – paid franchise taxes for calendar years 1999 to 2002 and fiscal years ending September 30, 2000, 2001, and 2002. Pet. App. at 2a. The Benders claimed that they were entitled to refunds totaling $241,815 on the theory that the tax was an income tax that burdened them personally, relying on the decision of the D.C. Court of Appeals in *Bishop v. District of Columbia,* 401 A.2d 955 (D.C. 1978), *aff'd,* 411 A.2d 997 (D.C.) (en banc), *cert. denied,* 446 U.S. 966 (1980). Pet. App. at 2a.

After the District of Columbia Office of Tax and Revenue denied their claims, the Benders challenged the ruling by filing an action in the Superior Court of the District of Columbia pursuant to D.C. Code § 47-3310(b) (2005). The Superior Court granted summary judgment in favor of the Benders. Although the court recognized that the franchise tax had been imposed by Congress, it held that the tax, as it applied to nonresidents, was effectively repealed by the Home Rule Act. The court reasoned that § 404(a) of that Act transferred to the Council the authority to promulgate regulations with respect to the 1947 Tax Act; the limitations on the Council's legislative authority under § 602(a)(5) of the Home Rule Act applied to the Council's exercise of this regulatory authority; and, hence, the unincorporated business franchise tax as a whole was invalid as applied to nonresidents. Pet. App. at 15a-30a.

The D.C. Court of Appeals reversed. In a unanimous decision, the court held that the unincorporated business franchise tax imposed by Congress in the 1947 Tax Act was not negated as applied to nonresidents by Congress's enactment of the Home Rule Act. Citing § 717(b) of the Home Rule Act, the savings clause, the court held that:

> . . . there was no inconsistency between the Home Rule Act and the Tax Act of 1947 because Congress, in the Tax Act of 1947, provided that there would not be a tax on the personal income of nonresidents but in the same legislation enacted the unincorporated business tax that had the effect of taxing that portion of the personal income of nonresident owners of unincorporated businesses derived from those businesses.

Pet. App. at 9a.

As evidence of Congress's intent to preserve the effectiveness of the 1947 Tax Act, the court cited § 471(1) of the District of Columbia Real Property Tax Revision Act of 1974, D.C. Code § 47-504(1) (2005), which "provided that the Council was 'authorized to change the rate of the taxes imposed under . . . the District of Columbia Income and Franchise Tax Act of 1947,'" and § 501 of the Tax Revision Act of 1974, 88 Stat. 1066, which provided that the Act may not be construed as limiting the authority of the Council under the Home Rule Act. Pet. App. at 5a, 9a. The court concluded that "[b]y giving the Council the right to determine the rate, Congress made it clear that the UB [unincorporated business] Tax remained in effect." Pet. App. at 9a.

The court distinguished its decision in *Bishop*:

. . . The problem addressed in *Bishop* was that the Council had exceeded its power conferred by Congress by actually purporting to repeal the Congressionally imposed "professional services" limitation. In substance, this court in *Bishop* held that the Council could not repeal a provision of the Tax Act of 1947 which excluded from the tax certain types of personal service income. 401 A.2d at 956-58. The *Bishop* court did not say that the District was precluded from taxing nonresidents "who operate an unincorporated business." *Id.* at 961. Conversely, in the instant case, the Council has not taken any action to amend the Tax Act of 1947 enacted by Congress; the Council has merely continued to exercise the power conferred by Congress to collect a tax imposed by Congress. The Tax Act of 1947 mandated that the UB Tax was payable by the individuals operating the unincorporated business. 61 Stat. at 346 (codified at D.C. Code § 47-1808.05 (2001)). Moreover, the UB Tax was not defined solely as a tax on residents but was specifically defined by Congress to include "that portion of the entire *net income* of every *nonresident* which is subject to tax under title VIII [Tax on Unincorporated Businesses] of this article." 61 Stat. at 343 (codified at D.C. Code § 47-1806.01 (2001)) (emphasis added). Thus, unlike the exclusion for personal services income, the Tax Act of 1947 specifically allowed for the taxation of nonresident personal income if that income is derived from the operation of an unincorporated business within the District of Columbia. . . .

Pet. App. at 10a-11a.

The D.C. Court of Appeals remanded the case to the Superior Court with instructions to enter summary judgment for the District. Pet. App. at 11a-12a. The Benders did not seek *en banc* rehearing.

REASONS FOR DENYING THE PETITION

A. Because the decision of the D.C. Court of Appeals involved an issue of local law only and was plainly correct, this Court's review is not warranted.

In *Pernell v. Southall Realty*, 416 U.S. 363 (1974), the Court stated that "[t]his Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application." *Id.* at 367. The Court explained:

> . . . [T]he new court structure certainly lends additional support to our longstanding practice of not overruling the courts of the District on local law matters "save in exceptional situations where egregious error has been committed." *Fisher v. United States*, 328 U.S. [463,] 476 [(1946)]; *Griffin v. United States*, 336 U.S. [704,] 718 [(1949)]. This principle, long embedded in practice and now supported by the clear intent of Congress in enacting the 1970 Court Reform Act, must serve as our guide in the present case.

Id. at 368-369. The D.C. Court of Appeals did not commit "egregious error." To the contrary, the decision was plainly correct.

The Benders mischaracterize the franchise tax in question as one imposed on them by the Council of the District of Columbia. *See* Pet. at 22-23. That incorrect characterization is central to their argument. However, the tax was imposed by Congress when it enacted the 1947 Tax Act. Moreover, the limitation in the Home Rule Act on the *Council's* authority to impose a commuter tax does not affect the authority of the District to continue to collect the tax.

The Benders have never disputed that *Congress* has the power to impose a tax on unincorporated businesses operating in the District even though it may affect the personal income of nonresident owners of or investors in the businesses.[6] *See* U.S. CONST. ART. I, § 8, cl. 17; *Neild v. District of Columbia*, 110 F.2d 246, 249 (D.C. Cir. 1940) (delegation to Congress "is sweeping and inclusive in character, to the end that Congress may legislate within the District for every proper purpose of government"). Although Congress broadly delegated legislative authority to the District Government it created when it enacted the Home Rule Act,[7] it did not thereby forgo its legislative power over the District. Section 601 of the Act expressly retains

---

[6]Nor have the Benders argued that they are within any of the exemptions from the tax. *See* D.C. Code § 47-1808.01 (2005). Moreover, payments by a business to an owner for services rendered for the business may be deducted from the business's income for purposes of calculating the franchise tax. *See* 9 D.C. MUN. REGS. § 104.1 (1998) ("Unincorporated businesses . . . shall be allowed an aggregate reasonable salary allowance for services rendered by the individual owners or members actively engaged in the conduct of the business" not to exceed 30 percent of the District net income).

[7]It is settled that Congress may delegate its legislative power over the District to any District Government that it creates. *See District of Columbia v. John R. Thompson, Inc.*, 346 U.S. 100, 106-107 (1953).

Congress's full legislative power over the District under the Constitution. It makes no sense to interpret the specific limitations on the *Council's* authority in § 602(a) of the Act, which immediately follows § 601, as placing any limitations on *Congress's* legislative authority.

Nor did the Home Rule Act diminish the force or effect of existing Acts of Congress pertaining to the District. The savings clause of the Home Rule Act, § 717(b), expressly continues the effectiveness of existing Acts of Congress, such as the 1947 Tax Act, by providing that "[n]o law or regulation which is in force on the effective date of title IV of this Act [January 2, 1975] shall be deemed amended or repealed by this Act except to the extent specifically provided herein or to the extent that such law or regulation is inconsistent with this Act . . . ." *See Citizens Association of Georgetown v. Zoning Commission of the District of Columbia,* 392 A.2d 1027, 1035 (D.C. 1978) (en banc).

There is no inconsistency between the 1947 Tax Act and the Home Rule Act. The Benders argue that § 602(a)(5) of the Home Rule Act prohibits "the D.C. Council's *application* of the unincorporated business tax to nonresidents." Pet. at i (emphasis added). However, the collection or "application" of a tax is not a legislative function that may be exercised by the Council, but rather an executive function.[8] Tax collection is the responsibility

---

[8]The doctrine of separation of powers fully applies in the District. *See Convention Center Referendum Committee v. District of Columbia Bd. of Elections and Ethics*, 441 A.2d 871, 878 (D.C. 1980), *aff'd on rehearing*, 441 A.2d 889 (D.C. 1981) (en banc) ("The legislative history of the Self-Government Act makes it clear that Congress intended to establish a traditional doctrine of separation of powers for the government of the District."). The Council can exercise its powers only by passing acts or adopting resolutions, not by the "application" of legislation. Home Rule Act, § 412; D.C. Code § 1-204.12 (2006).

of the Office of Tax and Revenue in the Office of the Chief Financial Officer, a part of the Executive Branch of the District Government. D.C. Code § 1-204.24a(a), (c)(4) (2006). Hence, as the D.C. Court of Appeals concluded, the limitation on the *Council's* authority under § 602(a)(5) to enact a commuter tax has no effect on the District's collection of the unincorporated business franchise tax imposed by Congress.

The Benders do not address the reasoning of the D.C. Court of Appeals but simply assert, in a footnote, that the court should not have relied on the fact that Congress, in the Tax Revision Act of 1974, authorized the Council to "change the rate of the taxes imposed" by Congress in the 1947 Tax Act, *see* D.C. Code § 47-504(1) (2005), because the former Act "does not refer in any way to 'non-residents', or even the UB Tax itself." Pet. at 21-22 n. 19. The Benders do not even mention § 501 of the Tax Revision Act of 1974, 88 Stat. 1066, on which the court also relied, Pet. App. at 5a-6a, and which makes clear that the Act does not limit the Council's authority under the Home Rule Act.

However, these provisions of the Tax Revision Act of 1974 are highly significant. First, they make clear that the tax was "imposed" by Congress and not by the Council. Second, they confirm that the tax remained in effect after the enactment of the Home Rule Act and, hence, was not affected by the limitations therein on the Council's power to impose a commuter tax. As the court explained:

> . . . Having imposed the tax, 61 Stat. at 345, Congress gave the authority to the Council to promulgate rules and regulations to determine the apportionment of the UB Tax, collect the UB Tax, see discussion *supra* Part II.C., and establish the UB Tax rate, § 471(1), 88 Stat. at 1064. The legislation which authorized the Council to

> establish the UB Tax rate was enacted in September 1974, approximately nine months after the passage of the Home Rule Act in December 1973 but before the Home Rule Act became effective in January 1975. This sequence of events demonstrates that Congress had not repealed the Tax Act of 1947 by enacting the Home Rule Act. By giving the Council the right to determine the rate, Congress made it clear that the UB Tax remained in effect.

Pet. App. at 9a (footnote omitted).

Finally, the Benders argue that the decision of the D.C. Court of Appeals is inconsistent with its decisions in *Bishop* and *District of Columbia v. Califano*, 647 A.2d 761 (D.C. 1994). Pet. at 17-18. However, even if this were a reason for this Court's review, the court's decision in the present case is in complete harmony with those cases.

Bishop invalidated an act of the Council that *repealed* the *exemption* contained in the unincorporated business franchise tax for professional and personal-services businesses. In the panel's decision in *Bishop,* which was reinstated by the full court, 411 A.2d at 999, the court, citing statements by members of Congress in the legislative history of the Home Rule Act, held that "by adopting the provision, Congress intended to prevent the District from enacting a commuter tax," 401 A.2d at 957, which the court defined as "a levy by a jurisdiction upon individuals who do not live in that jurisdiction *but work there on a daily basis*." 401 A.2d at 958 (emphasis added). Because the tax at issue in *Bishop* was in reality a tax on the partners of the law firm, who received distributions instead of wages, the court held that it ran afoul of the commuter-tax prohibition. However, nothing in *Bishop* suggests that the District was precluded from collecting

the franchise tax imposed by *Congress* on businesses that were *not* entitled to the professional or personal-services exemption, such as the Benders' businesses.

Likewise, in *Califano*, the court concluded that a franchise tax imposed on a law firm by New York was a tax on "personal income" entitling the firm's District partners to a credit on their individual income taxes for the taxes paid to New York. The New York tax was similar to the professional tax that the Council attempted to impose but that was invalidated in *Bishop*. Again, there is no suggestion that the District could not continue to collect the unincorporated business franchise tax imposed by Congress.

B. The difference in interpretation of District of Columbia law by the D.C. Court of Appeals and the Supreme Court of Virginia does not create a conflict requiring resolution by this Court.

The Benders' primary ground for invoking this Court's discretionary review is that the decision of the D.C. Court of Appeals is in conflict with the decision of the Supreme Court of Virginia in *Mathy v. Commonwealth of Virginia, Dep't of Taxation*, 483 S.E. 2d 802 (Va.), *cert. denied*, 522 U.S. 967 (1997). Pet. at 23, *citing* SUPREME COURT RULE 10(b). However, there is no conflict within the meaning of this rule.[9] Although the courts differed as to their interpretation of the Home Rule Act and the 1947 Tax Act, the decisions do not have

---

[9]It is also unclear whether the D.C. Court of Appeals "decided an important federal question" under Rule 10(b). *See Key v. Doyle*, 434 U.S. 59, 67-68 (1977) (holding statute enacted by Congress applicable solely to the District was not a "statute of the United States" within appellate jurisdiction of the Court under former 28 U.S.C. § 1257(1) (1982), which was for questions of national scope).

equal force because the Supreme Court of Virginia is bound to follow decisions of the D.C. Court of Appeals interpreting the law of the District of Columbia.[10]

This Court has held itself bound to the interpretation of state law by the highest court of the state. *See R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 391 (1992) ("In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court."); *Elmendorf v. Taylor*, 23 U.S. 152, 159-160 (1825) ("This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws.").

Directly on point, the highest courts of Maryland and Virginia have held that they were bound by the interpretation of the 1947 Tax Act by the D.C. Court of Appeals in *Bishop*. *See King v. Forst*, 391 S.E.2d 60, 62 (Va. 1990) ("We are bound by the interpretation given by the highest court of a sister jurisdiction to the law of that jurisdiction."); *Roach v. Comptroller of the Treasury*, 610 A.2d 754, 757 (Md. 1992) ("While the nature of another jurisdiction's statute for purposes of Maryland law is for this Court to decide, nevertheless, to the extent that we rely on the other jurisdiction's characterization of its statute in deciding that issue of Maryland law, we take the statute with whatever interpretative gloss has been placed upon it by the highest court of the other jurisdiction."). Because these

---

[10]Moreover, *Mathy* was wrongly decided because it did not distinguish between a tax imposed by Congress under the 1947 Tax Act and a tax imposed by the Council, but proceeded on the false premise that the unincorporated business franchise tax applicable to the taxpayer had been imposed by the Council.

courts would be similarly bound by the decision of the D.C. Court of Appeals in the present case, there is no true conflict.[11]

The cases the Benders cite are readily distinguishable. In *Monge v. California*, 524 U.S. 721 (1998), there was a conflict among state courts as to whether this Court's holding in *Bullington v. Missouri*, 451 U.S. 430 (1981) – *i.e.*, that the Double Jeopardy Clause prevented imposing the death sentence on a defendant retried for capital murder after receiving a lesser sentence – applied in noncapital cases. In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 710 (1994), the Court granted certiorari to resolve conflicting interpretations by state courts of an important provision of the federal Clean Water Act. In these cases, the decisions of the highest state courts were entitled to equal deference. In contrast, a decision of the D.C. Court of Appeals interpreting the law of the District of Columbia is entitled to deference by state courts, as well as the federal courts.

Therefore, there is no reason – let alone a "compelling reason," *see* Supreme Court Rule 10 – for this Court to exercise its discretionary jurisdiction to review the decision below.

---

[11]The decisions interpreted the holding in *Bishop* – *i.e.*, that the Council's imposition of a franchise tax on professionals such as lawyers was a tax on "personal income" – as meaning that the franchise tax as imposed by Congress on *other* businesses was also a tax on personal income. This extension of *Bishop* was unwarranted because the holding of that case was limited to the "professional tax" imposed by the Council. However, the decision of the D.C. Court of Appeals in the present case has now clarified the law of the District on this question.

C. The argument that the exemption limited to professional and personal-services businesses violates the Equal Protection Clause was not raised below and is without merit because it is rational to treat income derived from personal labors of individuals differently from income derived from business operations.

The Benders argue that the legislative scheme embodied in the 1947 Tax Act, which exempts professional and personal-services businesses but not other unincorporated businesses, violates the Equal Protection Clause of the Fourteenth Amendment.[12] Pet. at 29.

The Benders' constitutional argument should not be considered because it was not presented below but is raised for the first time in their petition to this Court. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983) (citing cases). Moreover, the argument is without merit.

The Benders argue that there is no rational basis for treating nonresidents engaged in professional or personal-services businesses differently from nonresidents engaged in other unincorporated businesses in the District, noting that "real estate investors are treated differently than lawyers or doctors." Pet. at 29. The argument would apply equally to District residents engaged in these businesses. However, it has long been settled that Congress and state legislatures have broad discretion in creating classifications in taxation as long as they are not

---

[12]The Fourteenth Amendment does not apply because the District is not a "state" within its meaning and because the 1947 Tax Act was enacted by Congress. However, equal protection principles are embodied in the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 498-499 (1954).

arbitrary. *See United States v. Ptasynski*, 462 U.S. 74 (1983) (upholding exemption in Crude Oil Windfall Profit Tax Act for certain wells located in Alaska); *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970) (upholding "grandfather clause" in federal tax laws exempting state-created nonprofit corporations organized before September 1, 1957, but not those formed after that date); *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 40 (1928) ("The equal protection clause of the Fourteenth Amendment does not preclude a state in imposing taxes from making exemptions, provided the power is not exercised arbitrarily.").

The one case that the Benders cite, *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), is readily distinguishable. In that case, the Court held that an Alabama statute, which granted a preference to its domestic insurance companies by imposing a substantially lower gross premiums tax rate on them than on out-of-state companies, had no rational basis. The Court held that "Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there" and "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Id.* at 878.

In contrast to the tax invalidated in *Ward*, the unincorporated business franchise tax imposed by the 1947 Tax Act applies equally to residents and nonresidents operating unincorporated businesses in the District. Moreover, the exemption for professional and personal-services businesses is reasonable because income received from those businesses is similar to income otherwise received by individuals primarily as a result of their personal labors, such as wages or self-employment income. It is rational to accord different treatment to investment income

derived from business operations, like that at issue in the present case.[13]

CONCLUSION

The petition should be denied.

Respectfully submitted,

LINDA SINGER
Acting Attorney General
for the District of Columbia

TODD S. KIM
Solicitor General

EDWARD E. SCHWAB
Deputy Solicitor General

*JAMES C. McKAY, Jr.
Senior Assistant Attorney General

---

[13] *Cf. Hendrick v. District of Columbia*, 183 F.2d 1002 (D.C. Cir. 1950), in which the D.C. Circuit rejected the argument that a stock brokerage was exempt from the franchise tax because it was a "business which by law, customs, or ethics cannot be incorporated," D.C. Code § 47-1808.01(1) (2005). The court held that while "lawyers and medical doctors who, by reason of the peculiarly confidential and fiduciary nature of their pursuits, are necessarily held to individual responsibility" were exempt, a "stock brokerage is little different from any business whose activities are essentially those of agents for purchase and sale." 183 F.2d at 1003-1004.

Counsel for the District of Columbia
Office of the Attorney General for
the District of Columbia
Office of the Solicitor General
441 Fourth Street, N.W., 6th floor South
Washington, D.C. 20001
(202) 724-5690

**Counsel of Record*

January 9, 2007